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tatus: GRANTED

Title: MacDonald, Sommer & Frates, Appellant
v.
County of Yolo, et al.

ocketed:
une 28, 1985

Court: Court of Appeal of California,
Third Appellate District

Counsel for appellant: Ellman, Howard N.

Counsel for appellee: Owen, William L., Sherwood, Richard W.

entry	Date	Note	Proceedings and Orders
1	Jun 28 1985	G	Statement as to jurisdiction filed.
3	Jul 15 1985		Order extending time to file response to jurisdictional statement until August 30, 1985.
4	Aug 23 1985		Motion of appellees City of Davis, et al. to dismiss filed.
5	Aug 28 1985		DISTRIBUTED. September 30, 1985
6	Sep 10 1985	X	Reply brief of appellant MacDonald, Sommer & Frates filed.
8	Oct 7 1985		REDISTRIBUTED. October 11, 1985
10	Oct 15 1985		REDISTRIBUTED. October 18, 1985
11	Oct 21 1985		PRECEDABLE JURISDICTION NOTED. *****
13	Nov 25 1985		Order extending time to file brief of appellant on the merits until December 19, 1985.
14	Dec 4 1985		Joint appendix filed.
15	Dec 18 1985		Brief amicus curiae of Adirondack Park Local Government Review Board filed.
16	Dec 12 1985		Brief amicus curiae of Mid-America Legal Foundation filed.
17	Dec 19 1985		Brief of appellant MacDonald, Sommer & Frates filed.
18	Dec 20 1985		Brief amicus curiae of United States filed.
19	Dec 19 1985		Brief amicus curiae of California Building Industry Association filed.
20	Dec 19 1985		Brief amicus curiae of First English Evangelical Lutheran Church, et al. filed.
21	Dec 19 1985		Brief amicus curiae of Lodestar Co., et al. filed.
23	Jan 2 1986		Order extending time to file brief of appellee on the merits until January 27, 1986.
24	Dec 19 1985		Brief amicus curiae of American College of Real Estate Lawyers filed.
25	Jan 17 1986		Certified record on appeal received, 1 Box.
26	Jan 22 1986		Application of California, et al. for leave to file a brief as amici curiae in excess of the page limitation filed (A-506), and order granting same by Rehnquist, J., on Jan. 23, 1986. The brief may not exceed 45 pages.
27	Jan 22 1986		
28	Jan 27 1986		Brief of appellees County of Yolo, et al. filed.
29	Jan 27 1986		Brief amicus curiae of The Conservation Foundation, et al. filed.
30	Jan 27 1986		Brief amicus curiae of County Supervisors Assn. of CA filed.
31	Jan 27 1986		Brief amicus curiae of National Assn. of Counties, et al. filed.
32	Jan 27 1986		Brief amicus curiae of American Farmland Trust, et al. filed.

ntry	Date	Note	Proceedings and Orders
33	Jan 27 1986	Brief amicus curiae of California, et al. filed.	
34	Jan 27 1986	Brief amicus curiae of National Institute of Municipal Law Officers, et al. filed.	
35	Jan 27 1986	Brief amicus curiae of Mountain View, CA filed.	
36	Feb 4 1986	SET FOR ARGUMENT, Wednesday, March 26, 1986. (3rd case)	
37	Feb 4 1986	CIRCULATED.	
38	Feb 26 1986	Application for leave to file a reply brief on the merits in excess of the page limitation filed (A-655),	
39	Feb 26 1986	and order granting same by Rehnquist, J., Feb. 27, 1986. The brief may not exceed 30 pages.	
40	Mar 18 1986	X Reply brief of appellants MacDonald, Sommer & Frates filed.	
41	Mar 26 1986	ARGUED.	

JURISDICTIONAL

STATEMENT

84-2015

Office-Supreme Court, U.S.
FILED

JUN 28 1985

No.

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

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June 28, 1985

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether a city's and county's actions constitute a taking under the Fifth and Fourteenth Amendments of the Constitution when the city and county have:

(a) Designated property "agricultural reserve" pursuant to a policy of preserving "prime agricultural lands", while acknowledging that the property is agriculturally impaired;

(b) Denied all access to the property from existing developed public streets by refusing to permit connection to the property;

(c) Deprived the property of the benefit of sanitary sewage disposal service, notwithstanding that the aggrieved property owner and its predecessors in interest have paid assessments for such services for many years;

(d) Denied that available domestic water exists despite proven sources of supply on the property adequate for serving the property;

(e) Refused to permit provision of fire and police protection services to the property even though such services could be provided for a lesser amount than the tax revenues generated from the proposed development of the property;

(f) Denied a development plan of the property which was consistent with the zoning of the property and the uses on adjacent properties;

(g) Participated in a continuing course of conduct, including arbitrary, capricious and conspiratorial planning and zoning activities, that rendered any further development applications futile; and

(h) Denied the property owner of any economically viable use of his land.

2. When zoning regulations are found to effect a taking, whether the Fifth Amendment mandates that the property owner receive just compensation for the time during which his property interest was subject to the regulations, or whether he can only obtain injunctive relief against future application of the regulations.

3. Whether a state, by limiting an aggrieved property owner's remedy to a mandamus action, deprives the property owner of an adequate state remedy, thereby denying the property owner of due process and rights protected pursuant to 42 U.S.C. § 1983.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of California.

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IN THE **Supreme Court of the United States**

OCTOBER TERM, 1985

No.

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

OPINIONS BELOW: PROCEDURAL HISTORY

On October 15, 1982, MacDonald, Sommer and Frates, a partnership, Appellant ("Property Owner") appealed to the Court of Appeal, Third Appellate District, from a judgment of the Yolo County Superior Court sustaining a demurrer to its complaint without leave to amend. The Court of Appeal filed its opinion on January 24, 1985, which was not certified for publication. The Opinion is attached as Appendix A.

Property Owner petitioned for a hearing before the Supreme Court of California. The Petition was denied by order dated April 3, 1985 (Appendix B) at which point the proceedings became final in the California State courts.

A Notice of Appeal to this Court was filed with the California Court of Appeal (which retains possession of the record in this case) on June 26, 1985 (Appendix C). The appeal is timely in this Court.

GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED

This Court has jurisdiction under 28 U.S.C. §1257(2).

Property Owner contends that the City of Davis, California ("City") and the County of Yolo, California ("County") have imposed regulations applicable to real property owned by Property Owner which deprives it of all economic beneficial use of the property (including deprivation of all investment-backed expectations), without payment of compensation as required by the Fifth and Fourteenth Amendments of the United States Constitution. City and County accomplished the "taking" by relegating Property Owner's property to agricultural use, notwithstanding their own finding that the property was "impaired" for such use due to its soil condition, and unsuitable for such use because of its proximity to adjoining residential structures. County restricted the land to agricultural use when it rejected Property Owner's request for approval of a residential subdivision and City participated in that action by refusing to allow access to the property by extensions of directly adjoining City streets. County then used denial of access and other services by City to justify its action. City chose to deny such services in order to carry out its open space policies with respect to lands directly adjoining its boundaries. During this entire period, Property Owner's property was planned and zoned for residential use in County.

Notwithstanding these allegations, the trial court sustained a general demurrer to the complaint and dismissed the action. The California Court of Appeal, Third Appellate District, affirmed the judgment. The Court of Appeal held that no taking had been alleged because (i) Property Owner *might* make a revised application for the development of the Property which *might* be approved, notwithstanding that the contrary must be presumed on the state of this record, and that (ii) in

any case, the imposition of excessively burdensome regulation does not give rise to a right of compensation, pursuant to the California Supreme Court's decision in *Agins v. Tiburon*, 24 Cal. 3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) (hereinafter "*Agins*"). By its order denying a hearing, the California Supreme Court left the conclusions of the Court of Appeal intact.

Thus, this case presents to this Court a clear opportunity to consider the question of whether or not local land use regulation which deprives a property owner of all economic beneficial use of its property (including all reasonable investment-backed expectations) violates constitutional rights and gives rise to a claim for compensation.

Cases sustaining this Court's jurisdiction on appeal to review state court judgments concerning regulatory takings of private property without just compensation are: *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (hereinafter "*San Diego Gas & Electric*"); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"... nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The pertinent California Statutes are set forth in Appendix "D."

STATEMENT OF THE CASE

This case comes up on the pleadings. The trial court sustained a demurrer to Plaintiff's fourth amended complaint (the "Complaint"), attached as Appendix E, without leave to amend and the Court of Appeal affirmed.¹ Thus, the facts set forth in the Complaint must, for purposes of review, be taken as true and liberally construed under both federal and California law,² except as modified by material of which the Court has taken judicial notice.³

Property Owner acquired the subject property (the "Property") in October, 1971. (CT ¶6) The Property is a 40-acre parcel located in County, in the immediate vicinity of City. (CT ¶6) Property Owner also owns another 15-acre parcel, immediately to the west of the Property, which is partially in City and partially in County (the "Connecting Property"). (CT ¶7) At all times relevant to this action, Cowell Boulevard has been improved to the western boundary of the Connecting

¹ References to the Complaint and the Court of Appeal opinion in this case are abbreviated as follows: Complaint, "CT"; Court of Appeal opinion, "CA".

² See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957); *Stevens v. County of Dutchess*, 445 F.Supp. 89, 91 (S.D.N.Y. 1977); and *Commercial Standard Ins. Co. v. Bank of America*, 57 Cal.App.3d. 241, 129 Cal.Rptr. 91 (1976).

³ Zoning ordinances and City actions are a proper subject of judicial notice. *City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 331, 99 Cal.Rptr. 21, 491 P.2d 813 (1971); Cal. Evid. Code § 452(b) (West).

Property. (CT ¶7) There are no physical or legal impediments prohibiting extension of Cowell Boulevard as a physically improved public street through the Connecting Property to the Property other than the decision of City not to allow such extension. (CT ¶7 and 8)

Since 1966, the Property has been zoned in County for single family and multiple residential use. (CT ¶8) The zoning is consistent with County's applicable General Plan. The Property is contiguous to other property which has been developed for single family residential use, and is near another parcel which County has recently approved for development as single family residences and which City has designated for annexation. (CT ¶9) The region in which the Property is located suffers from a severe housing shortage, and residential use of the Property could alleviate that shortage. (CT ¶10)

Residential development of the Property is feasible in terms of the physical characteristics of the Property and available infrastructure (except to the extent that City denied the use of available infrastructure, as more particularly described below). (CT ¶8) Residential use of the Property would be reasonable and beneficial. (CT ¶12)

The Property is not suitable for agricultural uses for a variety of reasons. (CT ¶11) The topsoil was removed from the Property under threat of condemnation to provide fill in connection with the construction of Interstate 80. (CT ¶11) The Property suffers from a chronic infestation of agricultural pests (nematodes) which destroy crops. (CT ¶11) Moreover, the proximity of residential development sharply inhibits economic methods of agricultural production. (CT ¶11) Thus, Property Owner cannot farm the Property and obtain an economic return. (CT ¶11) Farming does not produce enough income to cover the cost of farming and the cost of carrying the Property. Thus, it yields *zero return* on investment to Property Owner. (CT ¶11)

The rapid growth of California's population continues to create pressure for greater residential development. Resisting this pressure and denying access to "outsiders", many California cities have adopted "no growth" postures, promulgated through restrictive zoning and planning ordinances. California cities have frequently attempted to create "open space buffers" on their perimeters as a form of growth cap by designating certain properties "open space" or "agricultural reserve." Typically, only agricultural, recreational or related uses are permitted in such open space buffers. Cities and counties often justify this draconian planning technique under the guise of "preservation of agricultural lands" where, as in this case, no agricultural purpose is served by the regulation.

Over the last 20 years, City has continually resisted growth. This attitude has forced most development in the area to occur in County. Indeed, before Property Owner purchased the Property, County had approved a development plan that would permit intensive development of the Property as well as another 100 acres in County lying to the east of the Property. County's development plan, however, lapsed before Property Owner purchased the Property.

Thereafter, City stepped up its efforts to prohibit further growth in the area of the Property. Among these efforts, City enacted a revised General Plan designating the Property as "Agricultural Reserve."⁴ (CT ¶21) City's express policy for adopting this designation was to preserve "prime agricultural lands." (CT ¶21) However, City acknowledged that the Property was agriculturally impaired. (CT ¶24) In addition, City convinced County to adopt a resolution requiring future development to be limited to parcels within the City limits.⁵ Although this policy has not been uniformly followed, County cited it as one of the bases for denying Property Owner's application for development.

⁴ California law allows cities to exercise a limited planning authority beyond their borders. Cal. Gov't Code § 65300 (West).

⁵ Indeed, this policy was actually enacted after all of the hearings on Property Owner's development proposal but prior to County's Board of Supervisor's formal findings and conclusion denying the development.

Finally, on January 22, 1974, by a joint City-County resolution (74-214), City and County acted to deprive the Property of sewer service although the Property Owner and its predecessors had been paying sewer and drainage assessments for years and the Property is located in the sewer district. (CT ¶17 and 19)

In April, 1975, Property Owner applied to County for approval of a subdivision map seeking to implement residential use for the Property. (CT ¶20) The plan complied in all respects with applicable County ordinances and regulations, including its zoning ordinance and General Plan. (CT ¶20) The application demonstrated Property Owner's ability to execute the subdivision plan. (CT ¶20) Under State law, it is not possible to implement a plan of residential use without obtaining approval of a subdivision map which requires the type of application Property Owner made.⁶

City actively participated in the proceedings related to Property Owner's application, advising County that it should not approve the map because proposed residential use of the Property conflicted with City's designation of the Property as "agricultural reserve" on City's General Plan, although the Property lies outside the boundaries of City.⁷ (CT ¶21) City further advised County that it would refuse to accept dedications of public facilities (including the extension of Cowell Boulevard through the Connecting Property), refuse to allow Cowell Boulevard or its equivalent to connect to City streets as a private road, and refuse to provide any City services to facilitate residential development of the Property.

These refusals were not based upon any economic consideration or unavailability of infrastructure. (CT ¶21) Property Owner was required by law to (and was prepared to) construct all needed public improvements to County and City standards.

⁶ Cal. Gov't Code § 66426 (West).

⁷ While proceedings on Property Owner's map were pending before County, City approved a subdivision proposal for the property virtually contiguous to the Property (and between the Property and City limits) conditioned upon a cut-off of access to the Property. The physical conditions of this property and the legal constraints applicable to it do not differ from those of the Property except, of course, in the matter of City's designation of the Property as "agricultural reserve." (CT ¶9)

(CT ¶20) City denied access and services to the Property solely to create an open space buffer and growth cap against regional growth needs emanating from the East County and West Sacramento area. (CT ¶21)

After conducting public hearings and taking testimony, County denied Property Owner's application by Minute Order dated June 14, 1977. (CT ¶23) The County Board of Supervisors' findings denied residential use of the Property and stated that the Property could only be used for agricultural purposes, notwithstanding the Board's findings that the Property is *agriculturally impaired*. (CT ¶24) In general, the findings rely on City's action in refusing to provide access and determining that essential public services do not exist even though such services are available to neighboring properties on acceptable terms and conditions.⁸ (CT ¶25)

For all practical purposes, the Board's decision represents a final determination with respect to the Property even though it conflicts with County's own General Plan and zoning ordinances. County has refused to accept subsequent residential subdivision applications with respect to properties owned by Property Owner and returned their checks for filing fees.⁹

In 1977, Property Owner sought approval of a "housing allocation" for the Connecting Property within City, under City's General Plan, and Ord. No. 965. City denied the application by resolution because Property Owner refused to

⁸ If County had based its action on the unavailability of services or facilities essential to serve residential development (residential development being the preferred use) the proper action would have been to approve the tentative map, conditioned upon the subdivider's ability to establish the existence of necessary services as a condition to approval of the final map. This procedure is expressly contemplated by the Subdivision Map Act and is the most efficient and orderly method of proceeding since it establishes for the subdivider, the public agencies, and the public the exact conditions which must be fulfilled in order to implement a residential use. See Cal. Gov't Code §§ 66426 *et seq.* (West).

⁹ Property Owner also owns a 108-acre parcel lying East and adjacent to the Property. By letter dated April 19, 1977, citing City's General Plan as its reason, County refused to process a zone change application, tentative map application No. 2463, or E.I.R., and returned all related fees paid. The trial court took judicial notice of this letter.

"cul-de-sac" Cowell Boulevard, or otherwise cut off access to the Property.¹⁰ City has not deleted its Agricultural Reserve designation of the Property. In this factual context, it would be futile for Property Owner to apply for a use of the Property for anything other than agricultural purposes.

On this factual record, Property Owner brought an action against City and County in inverse condemnation. The trial court sustained Appellee's demurrers without leave to amend the Complaint and dismissed Property Owner's action. Property Owner appealed. Relying on *Agins*, the Court of Appeal held that the foregoing facts did not add up to a cause of action in inverse condemnation. The Court of Appeal stated that,

"We find the decision in *Agins* to be controlling herein. In that case the Supreme Court [California] specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation." (CA 8).

The Court of Appeal also determined that since this case represented only denial of one possible development scheme, some other less-intensive use might be made of the Property. (CA 11) But that conclusion is contrary to the facts alleged. Neither state law nor the ordinances of County allow residential development without a subdivision or parcel map. County refuses to accept an application for approval of any such map. Thus, the Court of Appeal states that Property Owner has not suffered a taking even though County refuses even to *consider* a form of approval indispensable to any feasible use.

By the acts described above, County and City have deprived Property Owner of all economic beneficial use of the Property (including all investment-backed expectations). Property Owner has established the futility of seeking relief by application for an alternative, feasible development plan.

¹⁰ The trial court took judicial notice of the action and resolution of the City Council.

To summarize, County rejects residential use allowed under its own General Plan to implement an agricultural reserve restriction contained in City's General Plan—even though the Property in question is located in County and is unsuited to agricultural use. Such use will not yield to Property Owner the cost of holding the Property, let alone an economic return. The conditions impairing the use of the Property for agricultural purposes were known to the Board of Supervisors of County when it made its decision. County refuses to entertain any other subdivision proposal from Property Owner and City refuses to provide services for residential use. And when permission to develop the Connecting Property in City was requested, City conditioned its approval upon denial of access and other services to the Property.

RAISING THE FEDERAL QUESTION

The Complaint alleged a taking of the Property for public use without compensation, thus depriving Property Owner of its property without compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments and 42 U.S.C. §1983. The Federal Constitutional questions were thus raised at the earliest possible time, and reiterated in every brief filed in the trial court and on appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL INTRODUCTION

The so-called inverse condemnation or "takings" cases raise three difficult questions of great national significance which require resolution by this Court. They are:

(a) When do regulations impermissibly infringe upon the rights of a property owner? Stated another way, at what point does the "taking" occur?

(b) When a taking occurs, what is the remedy? Is the property owner entitled to monetary compensation, or is he relegated to a lesser remedy, such as invalidation of the impending regulation?

(c) And if the property owner is entitled to monetary compensation for a taking, what is the measure of damages?

This case provides an ideal vehicle for addressing all of the foregoing questions. It presents a factual setting on which the California state courts and the federal courts are in direct and increasingly sharp conflict on the first two issues. And if this Court holds that compensation is available, the case provides a vehicle for pronouncement on the third.

In the last decade, this Court has begun to develop a framework for answering these questions.¹¹ In each of this Court's recent regulatory taking opinions, however, on the basis of procedural technicalities (*San Diego*) or unusual factual situations (*Penn Central* and *Loretto*), this Court has not issued a definitive statement of its position on regulatory takings.¹²

While this Court has not had a proper vehicle for a square holding, the California Supreme Court in *Agins* and the courts of other states¹³ have concluded that compensation is *never* available as a remedy for a regulatory taking. As this case demonstrates, the California courts have maintained that position post *San Diego*, a course which is likely to be followed by other state courts.

¹¹ See e.g., *Penn Central & Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Earlier cases include: *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹² Following the reasoning of numerous federal courts (see cases cited at note 15), in this Appeal, we have assumed that the dissenting opinion of Justice Brennan in *San Diego Gas & Electric* represents the view of a majority of this Court. It has often been noted that Justice Rehnquist expressed agreement "with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633-34. In addition, Justice Powell has cited Justice Brennan's dissent with approval on at least two occasions. See, *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981); *Parratt v. Taylor*, 451 U.S. 527 (1981).

¹³ E.g., *Davis v. Pima County*, 590 P.2d 459 (Ariz. App. 1978), rejecting compensation as a remedy for a regulatory taking.

Meanwhile, lower federal courts have tended to reach the opposite result, taking the Brennan dissent as the consensus view—but this interpretation has not prevailed in all circuits nor have the federal courts been able to articulate a consistent litmus test for determining when a taking has occurred or the standards by which compensation should be measured.

The decisional inconsistency between federal and state forums tends to pull the most important land use and environmental regulation cases into the federal courts, as aggrieved property owners shop for a forum wherein they can obtain the only meaningful remedy.¹⁴ This tendency further congests the dockets of federal courts with local land use matters, raising difficult question of comity and abstention and requiring federal judges to deal with a new and complex field of state regulation.

We submit that this Court should deal with the decisional confusion and inconsistency by a square holding to the effect that a regulatory taking gives rise to a right of compensation, declaring the standard by which it can be determined when a regulatory taking has occurred and the measure of damages to which a property owner is entitled as a result. This case provides a proper vehicle for resolving those questions.

We turn to a more detailed summary of the propositions stated in the Introduction.

A. While The Federal Courts Generally Agree That Compensation Must Be Paid For A Regulatory Taking, California Courts Adhere To The View That Such Form Of Relief Is Never Available.

In *San Diego Gas & Electric*, and numerous earlier cases (see cases cited at note 11, *supra*), this Court indicated that the Fifth Amendment requires a governmental entity to pay just compensation if the application of a zoning law denies a landowner of the economically viable use of his land. In *San*

¹⁴ As Mr. Justice Brennan observed in *San Diego*, the remedy of invalidation merely relegates the property owner to reprocessing before the same uncongenial administrative body which regulated away his rights in the first place.

Diego Gas & Electric, a majority of this Court expressly endorsed this position. Since this Court filed the opinions in *San Diego Gas & Electric*, the federal District Courts and federal Courts of Appeal have overwhelmingly followed Justice Brennan's position.¹⁵ The California Supreme Court and California Courts of Appeal, however, have rejected that interpretation of the Fifth Amendment as set forth in *San Diego Gas & Electric*.

The California Supreme Court in *Agins* held that inverse condemnation is an inappropriate remedy for an unconstitutional regulation. The California Supreme Court has not changed its position on this issue and the California Courts of Appeal have continued to follow the California Supreme Court's lead.

Meanwhile, Federal Courts have directly challenged California's position. For example, the United States Court of Appeals for the Ninth Circuit stated that *Agins*:

"... does not ... appear to be the law ... Thus, notwithstanding the view of the California Supreme Court, we assume that the excessive exercise of the government's law making powers may constitute a taking under the Fifth Amendment for which just compensation must be paid." *In re Air Crash In Bali*, 684 F.2d 1301, 1311, fn. 7 (9th Cir. 1982). See also *American Sav. & Loan Assoc. v. County of Marin* 653 F.2d 364 (9th Cir. 1981).

The California Supreme Court justifies the result it reaches by means of a "balancing test." But this test is not appropriate to the issue because it essentially ignores the impact of the

¹⁵ *Hamilton Bank of Johnson City v. Williamson Cty. Reg. Planning Comm'n*, 729 F.2d 402 (6th Cir. 1984), cert. granted, 105 S.Ct. 80 (Oct. 1, 1984); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983), cert. denied, 104 S.Ct. 151 (1983); *Barbian v. Panagis*, 694 F.2d 476, 482 (7th Cir. 1982); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981); *Jentgen v. United States*, 657 F.2d 1210, 1212 (Ct. Cl. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Kinzli v. City of Santa Cruz*, 539 F.Supp. 887, 896 n.3 (N.D. Cal. 1982).

regulation in question on the holder of the constitutional rights, i.e., the regulated property owner. Essentially, the Court concludes that government's ability to regulate freely, *in the name of the public interest*, would be inhibited by a duty to pay compensation. Thus the rights of the property owner to be paid are overbalanced by the public interest, no matter how great the degree of invasion. In *Agins*, the California Supreme Court stated:

"In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." 24 Cal.3d at 276-77, 598 P.2d at 31, 157 Cal.Rptr. at 378.

Mr. Justice Brennan's opinion in *San Diego* declares that the California Court is focusing on the wrong pan of the balance.

"But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches, nor can vindication of those rights depend on the expense in doing so." 450 U.S. at 661.

The California Supreme Court has refused to reconsider its opinion in *Agins*, post *San Diego*, and the California Courts of Appeal follow state court precedents. A definitive decision by this Court is needed to eliminate the conflict.

B. This Court Should Establish Comprehensive And Specific Rules On The Regulatory Taking Issue To End Disparate And Inequitable Treatment Of Landowners.

The regulatory taking issue is national in scope. Because of the absence of a comprehensive Supreme Court rule on this federal constitutional issue, the various state courts have issued exceedingly diverse opinions. As a result, property owners of various states are subjected to disparate interpretations of the same federal constitutional right.

There is no uniformly accepted standard for determining when a level of regulation is constitutionally impermissible. For instance, the Wisconsin Supreme Court has held that zoning agriculturally unusable land as agricultural is unconstitutional. *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471 (Wisc. 1973). In opposition, the California courts have held that zoning agriculturally unusable land as agricultural is permissible. CA 10; *Helix Land Co. v. City of San Diego*, 82 Cal.App.3d 932, 147 Cal.Rptr. 683 (1978).

New Jersey has held that even a one-year freeze on land use requires the purchase of a one-year option to purchase the property. *Lomarch Corp. v. City of Englewood*, 237 A.2d 881 (N.J. 1968). On the other hand, the California Supreme Court has held that an uncompensated five-year moratorium is constitutionally permissible. *State of California v. Superior Court*, 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

The federal district and appellate courts, in contrast to the state courts, have been generally consistent in concluding that oppressive uses of the regulatory police power may constitute a violation of the Civil Rights Act and the United States Constitution, requiring compensation. (See cites at note 15, *supra*.) But the standards differ. There is little uniformity among the various courts on when a taking occurs and the measure of damages.

The states are equally in disarray concerning the appropriate remedy for a regulatory taking. California (*Agins*) and Arizona (*Davis v. Pima County*, 590 P.2d 459 (Ariz. App. 1978)) reject compensation as a remedy, opting for invalidation as the only solution.

By contrast, compensation is apparently available in Ohio, *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972), *cert. denied subnom.*, *Chongris v. Corrigan*, 409 U.S. 919 (1972); New Hampshire, *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981); Georgia, *Clifton v. Barry*, 259 S.E.2d 35 (Ga. 1979); Massachusetts, *Hamilton v. Conservation Comm'n*, 425 N.E.2d 358 (Mass. App. 1981); Alaska, *Pioneer Sand & Gravel*

v. *Anchorage*, 627 P.2d 651, 652 n.2 (Alaska 1981); Florida, *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (1981), *cert. denied*, 454 U.S. 1083 (Fla. 1981); Minnesota, *Pratt v. State*, 309 N.W.2d 767, 774 (Minn. 1981); New Jersey, *Sheerr v. Township of Evesham*, 184 N.J. Super. 11, 27-28, 445 A.2d 46, 54 (Law Div. 1982); North Dakota, *Rippley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); and Wisconsin, *Zinn v. State*, 112 Wis. 2d 417, 428-29, 334 N.W. 2d 67, 72-73 (Wis. 1983).

C. The Record Of This Case Is Appropriate For A Review Of Regulatory Taking Law: Property Owner Has Properly Alleged The Futility Of Further Development Applications And Has Stated A Cause Of Action In Inverse Condemnation.

This case contains a simple and dramatic factual and procedural record from which this Court may issue a comprehensive regulatory taking opinion. Since it comes up on the pleadings, there is no lengthy record to analyze.

The Complaint establishes a clear regulatory taking. Despite a severe housing shortage, City undertook an intentional course of conduct to prevent any development in the vicinity of the Property. As part of these actions, City designated the Property as Agricultural Reserve, notwithstanding County's finding that the Property is agriculturally impaired. City implemented its open space policy by denying access to the Property over existing City streets and declaring its refusal to provide essential services to support residential use. Nothing other than City's open space policy prompted the denials of access and service which could have feasibly been provided and for which Property Owner was ready, willing and able to pay (such payment including physical construction to City standards of all required infrastructure improvements). The basis for the regulatory actions taken by County and City, together with subsequent refusal even to entertain alternative applications, demonstrate the futility of any attempt to seek administrative relief. Notwithstanding this record, the Court of Appeal held that Property Owner was not entitled to compensation.

This case also presents an opportunity to resolve the conflict between federal and state decisions on when a regulation impermissibly invades a property owner's rights.¹⁶ The Court of Appeal held that the state of facts presented by Property Owner did not establish an impermissible invasion of its rights because:

"Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development . . ." (CA 11).

This conclusion ignores proof that submission of any other plan would be futile (see note 9 *supra*)—and conflicts with two recent federal cases.

In *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 151 (1983); and *Kinzli v. City of Santa Cruz*, 539 F.Supp. 887 (N.D. Cal. 1982), the courts held that the submission of a development plan was not a prerequisite for a plaintiff to state a cause of action in inverse condemnation under the Fifth and Fourteenth Amendments. In each of these cases, the court found that it would have been futile for the plaintiffs to have submitted any development plans for approval because statements by representatives of the municipal agencies and various regulations made it obvious that any proposal would be denied, except upon conditions which would be excessively burdensome or not advance legitimate state interest.

It would be futile for Property Owner to submit another development plan to County for approval. City's absolute refusal to allow access or provision of necessary services, renders impossible any development of the Property. County

¹⁶ California courts at least pay lip service to the notion that a regulation may be constitutionally impermissible due to the degree of invasion of a property owner's rights, the remedy of such a case being invalidation rather than payment of compensation.

has refused to process tentative subdivision proposals and the result of any application is pre-ordained by City's "Agricultural Reserve" designation.¹⁷

D. Injunctive Relief Alone Is Not An Adequate Remedy For A Regulatory Taking.

Under *Agins*, a landowner whose property is taken through overregulation must either seek declaratory relief to have the offending ordinance declared unconstitutional or seek mandamus to have the actions of the regulating body reviewed to determine if its decision is supported by substantial evidence.¹⁸ While these remedies may provide adequate relief in some instances, the possibilities for abuse by regulating bodies through the use of their police power is great.

In his *San Diego* dissent, Justice Brennan stated that invalidation does not compensate the property owner in the constitutional sense. 450 U.S. at 619-20.

Governmental agencies may easily undermine the effect of the invalidation remedy. For example, as one commentator notes:

¹⁷ The Federal Courts neither require the detail nor the precision in pleading a taking as the California Courts have required in this case. For example, in *Lake County Estates v. Tahoe Regional Planning Comm'n*, 440 U.S. 391 (1979), the property owners alleged only that the zoning on their land had been changed from residential or commercial to general forest district, recreation district or conservation reserve and that the rezoning constituted a taking. 566 F.2d at 1357-1358. (The allegations may be found in the Court of Appeals' opinion, *Jacobson v. Tahoe Reg. Planning Agency*, 566 F.2d 1353 (9th Cir. 1977).) Nonetheless, a cause of action was found, both by the Court of Appeals (566 F.2d at 1359, fn.9) and this Court (440 U.S. at 398-400). Moreover, the face of the Lake County ordinance expressly permitted certain uses, to wit:

"Generally the ordinance allowed very limited residential use, and no tourist, residential or commercial use, of the rezoned land. Other permitted uses included hiking trails, campgrounds, stables, recreation camps, skiing facilities, timber growing, livestock grazing and electrical substations. In addition, outdoor recreation concessions and educational facilities were allowed in the 'Recreation District.'" (566 F.2d at 1358).

Notwithstanding the facial allowance of some use, a cause of action was held stated in *Lake County* contrary to the case here.

¹⁸ Cal. Civ. Proc. Code § 1094.5 (West).

"[I]nvalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again."¹⁹

In *Agins* the California Supreme Court stated that the inverse condemnation remedy may impose an unreasonable economic burden on cities and other governmental agencies. This Court can define the showing required to establish a regulatory taking in a manner designed to reduce the risk of economic burden—and make it unlikely that any public agency will be caught by surprise.

The limited risk of such liability may encourage governmental agencies to scrutinize proposed regulations more closely. As Justice Brennan noted, "After all, if a policeman must know the Constitution, then why not a planner?" 450 U.S. at 661, fn.26.

The California Supreme Court in *Agins* argued that the damages remedy would have a chilling effect on land use planning. Granting that this case deals with an area of the law rich in anomalies and elusive theoretical concepts, Property Owner contends that an award of damages for violation of constitutionally protected property rights will have no chilling effect upon the legitimate planning activities of government in any of the following cases:

- (a) The regulations deprive the property owner of all economic beneficial use of his property and the degree of deprivation is known to and intended by the regulating authority;

¹⁹ Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas In San Diego*, 57 IND. L.J. 45, 51 (1982). Accord, Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. Rev. 711, 732-34 (1982).

(b) The regulations have not been adopted or applied in good faith, with regulations and ordinances kept in a state of inconsistency precluding the grant of approvals purportedly permitted;

(c) Public facilities and services essential to use of the property are deliberately withdrawn for the purpose of preventing use of the property; and

(d) The property owner's commitment and degree of loss is in large part a reflection of inducements provided by the regulating body under circumstances where it would be inequitable to allow the inducements to be withdrawn without compensation.

Awards of compensation where any one of the foregoing showings can be made would not impinge upon legitimate planning activities. Property Owner's Complaint demonstrates the presence of not one, but *all* of these criteria in this case.

E. The California Supreme Court's Extinction Of The Damage Remedy Leaves Landowners Without Due Process Of Law And Is, Therefore, In Violation Of 42 U.S.C. §1983.

The Court of Appeal held that Property Owner did not state a cause of action under 42 U.S.C. §1983. The Court of Appeal stated that:

"Whether a deprivation occurs without due process of law depends upon whether the state has provided an adequate remedy in the event of a deprivation. [Cite omitted] The United States Supreme Court has not determined whether a State may limit the remedies available to a person whose land has been taken without just compensation to exclude monetary damages. [Cite omitted] Nevertheless, as an intermediate state appellate court, we are constrained by principles of stare decisis to conclude that adequate remedies do exist in the event land use regulation does amount to an uncompensated taking of private property. (*Agins v. City of Tiburon*, *supra*, 24 Cal.3d at pp. 276-277.) Accordingly we hold that Plaintiff has not stated a cause of action for the violation of its civil rights." (CA 14-15)

This quotation again demonstrates the refusal of lower courts in California to ignore an opinion of the California Supreme Court and follow the opinions of this Court, even in the matter of the interpretation of a federal statute.

CONCLUSION

The present case presents a factual situation which gives the Court jurisdiction to decide a constitutional issue of national significance. City's and County's continuing course of conduct has denied Property Owner of any economically viable use of the Property. Just compensation must be paid for such a taking and the holding in the California Supreme Court case of *Agins v. City of Tiburon* must be reversed.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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EDWARD R. MACDONALD
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June 28, 1985

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A-1

APPENDIX A

FILED
JAN 24, 1985
COURT OF APPEAL
THIRD DISTRICT
WILFRIED J. KRAMER, Clerk

NOT TO BE PUBLISHED
C O P Y
IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
THE THIRD APPELLATE DISTRICT
(YOLO)

MACDONALD, SOMMER & FRATES,
a Partnership,

Plaintiff and Appellant,

v.

THE COUNTY OF YOLO and
THE CITY OF DAVIS.

*Defendants and
Respondents.*

3 Civ. 22306
(Super.Ct.No. 36655)

Plaintiff MacDonald, Sommer & Frates, a joint venture, appeals from a judgment of dismissal entered after the Superior Court of Yolo County sustained demurrers to its complaint for

the alleged deprivation of real property without just compensation. Plaintiff contends that it has stated causes of action for inverse condemnation, for denial of access, and under the federal Civil Rights Act (42 U.S.C. § 1983), and that its complaint is not barred by the failure to exhaust administrative remedies nor by principles of res judicata. We hold that the complaint does not allege facts sufficient to constitute causes of action in inverse condemnation, denial of access or under the federal Civil Rights Act. Accordingly we need not consider whether the complaint was barred by the failure to exhaust administrative remedies or by res judicata. We shall affirm the judgment of dismissal.¹

FACTS

Plaintiff filed its fourth amended complaint on October 27, 1981. Since we consider whether the trial court correctly sustained a demurrer to this complaint we must accept as true all the properly pled factual allegations of the complaint. (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 511.) The following factual allegations are contained in the complaint.

In October 1971 plaintiff acquired title to a parcel of real property in the County of Yolo, which we will refer to as "the property." The property is within the County of Yolo, but outside of the boundaries of the City of Davis. Plaintiff also owns another parcel of property, referred to as the "connecting property," which is within the boundaries of the City of Davis. The property is well situated for development as residential property, and since 1966 has been designated in the County's general plan and zoning ordinances for single family and

¹ Defendants have asked that we take judicial notice of the agricultural use of appellant's property, that nematodes do not prevent agricultural use, that the soil of the land is prime agricultural soil, and that the property has monetary value. Since these are not matters of common and accepted knowledge they are not subject to judicial notice. (*Galloway v. Moreno* (1960) 183 Cal.App.2d 803, 809; *Berry v. Chaplin* (1946) 74 Cal.App.2d 669, 676.) Defendants' motion is denied.

Plaintiff has also asked us to take judicial notice of certain matters. The trial court took judicial notice of the first three items, and we shall do likewise. (Evid. Code, § 459, subd. (a).) The fourth item is an official act of the City of Davis, and the fifth item is a stipulation for a continuance of plaintiff's pending mandate action. These items are appropriate for judicial notice and plaintiff's motion is granted.

multiple residential use. The property is contiguous to other property which has been developed for single family residential use, and is near another parcel which has recently been approved for development as single family residences.

Plaintiff alleges the property is not suitable for agricultural use for a variety of reasons. Specifically, the topsoil has been removed under threat of condemnation, the soil is infected with nematodes which destroy crops or increase farming costs, and the proximity of residential property makes cultivation economically unprofitable.

Plaintiff further alleges that the provision of goods and services to the property for residential development is possible and feasible. The property is adjacent to the connecting property owned by plaintiff, which is served by a developed public street which could be extended through the connecting property to the subject property. The property has been included within the El Macero Sewer Assessment District for purposes of service by a sewage disposal system. Domestic water is available, as are police and fire protection services on adjoining property.

The City and the County have denied all access to the property from existing developed streets by refusing to permit connection thereto, deprived the property of sewage disposal service despite the fact that the plaintiff and its predecessors in interest have paid assessments for many years, denied that available water exists, and refused to permit the provision of police and fire protection services. As a result, the City and County have deprived the property of any beneficial use which is not economically infeasible, prohibited by law, or prevented by actions of the City and County.

In 1961 the County created the El Macero Sewer Assessment District for the purpose of assessing lands to raise funds for construction of a sewage treatment plant and facilities. The subject property was within the lands to be assessed and served. In 1966 the City annexed approximately 760 acres of land within the District and assumed responsibility for governmental services formerly provided by the County. This included certain governmental services for the subject property. In 1968 the County created the El Macero County Service Area to

perform services with proceeds from the District assessments. In 1970 the City created the Davis Municipal Sewer Facilities No. 1, and jointly undertook with the District to create facilities to service certain land, which included the subject property. In 1972 the City, acting for the County and District, applied for a grant contract from the federal government and the state to construct sewer and drainage improvements. In the application the City represented that the improvements would serve a population calculated by assuming development of the subject property. Subsequently the City, County and District revised the project to exclude the subject property and reduced the size and service capacities of the project facilities. The City amended its general plan to revise downward the projected population growth, to reduce the ultimate population of the District, and to adopt the "restrictive and parochial policies" which violate the City's duty to provide for regional housing needs. Although the County did not revise its general plan and zoning ordinance, it agreed with the City to implement its illegal policies. The City, County and District continued to seek state and federal funds for the construction of facilities and in doing so conspired to defraud the state and federal governments. Plaintiff has paid approximately \$75,000 in assessments to the District on the basis that the property would be benefited, but the City, County and District have precluded plaintiff from being able to make use of the facilities for which it was assessed.

In 1975 plaintiff applied for approval of a subdivision map from the County. The City acted to prevent the County from approving the application. Specifically the City: (1) advised the County that the property has been designated "agricultural preserve" or "agricultural reserve" on the City's general plan; (2) approved a subdivision map on the Simmon's parcel upon condition that the parcel be annexed to the City and upon development of a street configuration which would deprive the subject property of access to public streets; (3) refused to accept dedication of portions of the connecting property for purposes of extending an existing public street to serve the subject property, refused to permit the extension of the street as a private road, and refused to permit the County or other governmental agency to extend or maintain the street on the

connecting property; (4) announced that it would refuse to accept dedications of public facilities, refuse to accept annexation of the property, and refuse to provide city services to the property. The County denied plaintiff's subdivision application. In doing so the County determined that the property lacked access by suitable public streets, lacked sewer services, lacked an adequate water supply, and lacked adequate police and fire services. The property is not suited for any of the uses permitted in the Yolo County Code. Any application for a zone change, variance or other relief would be futile.

Plaintiff set forth seven causes of action based upon these allegations. On appeal it has abandoned the first, fourth, fifth and sixth causes of action in the complaint. We shall here discuss only the remaining second, third and seventh causes of action.

In its second cause of action plaintiff sought damages for inverse condemnation. Plaintiff alleged that the actions of the City and County deprived it of the entire economic value and beneficial use of the property. In the third cause of action plaintiff sought damages for denial of access. Plaintiff alleges that the City and County intentionally deprived it of access to the property suitable for residential development, and have used the lack of access as an excuse for denying approval for development. The seventh cause of action was based on the federal Civil Rights Act. (42 U.S.C. § 1983.) Plaintiff alleges the City and County have acted in a manner which amounts to a taking of private property without just compensation.

The trial court sustained demurrers to the fourth amended complaint without leave to amend. The court ruled with respect to each cause of action that the complaint failed to state facts sufficient to constitute causes of action. The court also ruled that with respect to each cause of action the plaintiff had failed to exhaust its administrative remedies. The court further ruled with respect to the second and third causes of action, that the County Board of Supervisor's denial or rejection of the application for a subdivision is res judicata and not subject to collateral attack.

DISCUSSION

I. Inverse Condemnation

In recent times actions in inverse condemnation based upon governmental regulation of the use of land have been common. In *HFH, Ltd. v. Superior Court*, *supra*, 15 Cal.3d 508, the Supreme Court held that a zoning action which merely decreases the market value of property does not violate constitutional provisions against the taking or damaging of property without compensation and therefore cannot support a cause of action in inverse condemnation. (15 Cal.3d at p. 518.) In *HFH* the Court specifically left open the question whether a regulation which forbids substantially any use of the land in question may give rise to a cause of action in inverse condemnation. (*Id.*, at p. 518. fn. 16.)

In *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 275, the Court considered the question left open in *HFH*. The Court said: "We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." The Court added: "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." (*Id.*, at pp. 276-277.) On appeal to the United States Supreme Court the decision was affirmed. However the High Court did not consider whether a state may limit the remedies available where land has been taken, since the Court agreed that under the circumstances no taking occurred. (*Agins v. Tiburon* (1980) 447 U.S. 255, 263 [65 L.Ed.2d 106, 113-114]. See also *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 628 [67 L.Ed.2d 551, 558].)

We find the decision in *Agins* to be controlling herein. In that case the Supreme Court specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation. We emphasize that the Court did not hold that

regulation cannot amount to a taking without compensation, it simply held that in such event the remedy is not inverse condemnation. The remedy instead is an action to have the regulation set aside as unconstitutional. (See *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 874.) Plaintiff has filed a mandate action in the trial court which is currently pending. That is its proper remedy. The claim for inverse condemnation cannot be maintained.²

In support of its position plaintiff also relies upon the recent decision in *Sederquist v. City of Tiburon* (9th Cir. 1984) 746 F.2d 543. There the landowners were owners of 7 lots in an illegal subdivision called Hacienda Heights in the City of Tiburon. When they acquired their lots they also received a grant of a 50 foot roadway easement on a dirt strip called Hacienda Drive. Two of the lot owners applied to the city for a permit to pave that strip. The city denied the application because it was inconsistent with a proposed (and later adopted) "circulation element" for that area, and because the land was undeveloped and already had a satisfactory access for its present use. One of lot owners, the Sederquists, also applied for a variance from the subdivision provisions of the zoning ordinance requiring a master plan. They declared that the other lot owners in Hacienda Heights would not cooperate in attempting to develop a master plan. The city denied that application as well. The Sederquists then filed suit in the federal district court claiming among other things that the city's denials constituted inverse condemnation and a denial of due process. The trial court granted the city's motion for summary judgment and the Sederquists appealed. The Court of Appeals for the Ninth Circuit, in a split decision, reversed the lower court, holding that a genuine issue of material fact existed as to whether the city's requirement that the landowners submit a master plan required a type of joint action prohibited under

² Plaintiff attempts to distinguish the decision in *Agins*, by contending that in that case the Court referred only to inadvertent impositions on land use through regulation, rather than intentional impositions. The argument fails. Inverse condemnation arises only from a deliberate act carrying out public policy. (*Yee v. City of Sausalito* (1983) 141 Cal.App.3d 917, 920.) If the imposition in *Agins* had not been deliberate there would have been no need to determine whether inverse condemnation was an appropriate remedy. Moreover, all land use planning is, or should be, intentional. Nothing in *Agins* suggests the limitation urged by plaintiff.

state law and thus resulted in a taking for Fifth Amendment purposes. In the course of its decision the majority considered the city's contention that the circulation element is only a general plan which does not amount to inverse condemnation. The Court responded that the conditions imposed by the city requiring joint action of other owners on the master plan may constitute a taking and for that same reason the landowners could challenge the circulation element. It conceded that the city could properly impose zoning restrictions on property and asserted only that it could not do so "[by] means [which] may be illegal under California law." (*Id.*, at p. 548.) That case has no bearing on this appeal because there is no illegal joint action required by the city here. In any event, we agree with the dissent that "[i]t is inconceivable that the denial of an application to pave a private driveway constitutes a taking of property. The denial does not affect the applicants' right to use their property in a lawful manner." (*Id.*, at p. 551.)

In any event, even if an inverse condemnation action were available in a land use regulation situation, we would be constrained to hold that plaintiff has failed to state a cause of action. Pared to their essence, the allegations are that plaintiff purchased property for residential development, the property is zoned for residential development, plaintiff submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application. In these allegations plaintiff is not unlike the plaintiffs in *Agins*. There the plaintiffs had purchased approximately five acres for residential development. The plaintiffs alleged that the land had greater value than any other suburban land in California. (See *Agins v. Tiburon*, *supra*, 447 U.S. at p. 258 [65 L.Ed.2d at p. 110].) The City adopted a zoning regulation which would have limited the development of the land to one to five residential units. (*Agins v. City of Tiburon*, *supra*, 24 Cal.3d at p. 271.) Without attempting to obtain approval to so develop the land, the plaintiffs brought an action alleging that the City's action had completely destroyed the value of the land for any purpose or use. Under these circumstances both the California Supreme Court and the United States Supreme Court held that the plaintiffs had failed to allege facts which would establish an

unconstitutional taking of private property. (447 U.S. at pp. 262-263 [65 L.Ed.2d at p. 113]; 24 Cal.3d at pp. 277-278.)

The plaintiff's claim here must fail for the same reasons the claims in *Agins* failed. Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action.

II. Denial of Access

Plaintiff contends that it has stated a cause of action in inverse condemnation for denial of access. The basis of this contention is the allegation that the City has indicated it would oppose the extension of Cowell Boulevard through the plaintiff's connecting property to the subject property, and would refuse to accept a dedication of such an extension. Plaintiff relies upon the decision in *Jones v. People ex rel. Dept. of Transportation* (1978) 22 Cal.3d 144.

We find the decision in *Jones* to be inapposite. In that case the plaintiffs owned property with existing access to a public road. The State planned a freeway which would compel it to condemn a portion of the plaintiffs' property and which would cut off their existing access. Under these circumstances the Supreme Court held that the plaintiffs were entitled to recover in inverse condemnation. The decision makes clear, however, that the actionable taking was the interference with an existing access, and not the mere refusal to provide access where none had existed before. (22 Cal.3d at p. 151. See also *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 388.)

This requirement of an existing right was highlighted in *Hollister Park Inv. Co. v. Goleta County Water Dist.* (1978) 82 Cal.App.3d 290. There a landowner was unable to obtain a new connection to the water district's water service due to certain resolutions calling for a moratorium on new connections during emergency conditions and pending study. The landowner contended that the inability to obtain a connection rendered the land unsuitable for development, or for any purpose, and sought damages in inverse condemnation. The Court of Appeal held that no cause of action was stated. In order for a landowner to state a cause of action in inverse condemnation there must be an invasion or an appropriation of some valuable property which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury. (82 Cal.App.3d at p. 293.) The landowner had no existing right which was interfered with by the district. The court concluded that damage to the landowner from the refusal to permit new connections was not compensable; if the district were not carrying out a legal duty then the remedy was a petition for a writ of mandate. (*Id.*, at p. 294.)

The reasoning of the decision in *Hollister Park Inv. Co.* is equally applicable here. Plaintiff complains that the City will not give it access to its property by extension and dedication of a public roadway. However, a cause of action in inverse condemnation for the denial of access can only arise where the government interferes with existing access, it does not arise from the refusal to provide access where none existed before. Plaintiff has consequently failed to state a cause of action for denial of access.³

III. Civil Rights Act

Plaintiff contends that even if the sole California remedy for restrictive land use regulation is mandate or declaratory relief, the same facts give rise to a cause of action under the federal Civil Rights Act. (42 U.S.C. § 1983) We cannot agree. In order to state a cause of action under the federal act it is necessary to allege that there has been a deprivation of a

³ In any event, it is clear that plaintiff's true complaint is that it has not been allowed to utilize the land in a manner which would make maximum use of access rather than that all access has been denied. Such a complaint is not compensable in inverse condemnation. (*Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 872, fn. 6.)

property right by the state or by persons acting under color of state law. (*Parratt v. Taylor* (1981) 451 U.S. 527, 536 [68 L.Ed.2d 420, 429].) But those allegations are not in themselves enough. The plaintiff must also be able to allege that the deprivation was without due process of law. (*Id.*, at p. 537 [68 L.Ed.2d at p. 430].) Whether a deprivation occurs without-due process of law depends upon whether the state has provided an adequate remedy in the event of a deprivation. (*Id.*, at pp. 537-539 [68 L.Ed.2d at pp. 430-431].) The United States Supreme Court has not determined whether a State may limit the remedies available to a person whose land has been taken without just compensation to exclude monetary damages. (*Agins v. Tiburon*, supra, 447 U.S. 263 [65 L.Ed.2d at pp. 113-114].) Nevertheless, as an intermediate state appellate court, we are constrained by principles of stare decisis to conclude that adequate remedies do exist in the event land use regulation does amount to an uncompensated taking of private property. (*Agins v. City of Tiburon*, supra, 24 Cal.3d at pp. 276-277.) Accordingly we hold that plaintiff has not stated a cause of action for the violation of its civil rights. (See also *Gilliland v. County of Los Angeles* (1981) 126 Cal.App.3d 610, 617.)

In any event, what we said with regard to inverse condemnation applies equally here. Even if a cause of action for monetary damages could be stated under the Civil Rights Act based upon the regulation of the use of property, the allegations would be insufficient in this case. Plaintiff seeks compensation because the County refused approval of the intensive development it desires, but that refusal does not mean that other, less intensive uses would also be denied. Accordingly plaintiff has not alleged facts sufficient to establish an uncompensated taking of its property. (*Agins v. City of Tiburon*, supra, 24 Cal. 3d at pp. 277-278.)

The judgment is affirmed.

SPARKS, J.

We concur:

CARR, Acting P.J.

SIMS, J.

B-1

APPENDIX B

SUPREME COURT

FILED

APR - 3 1985

Laurence P. Gill, Clerk

DEPUTY

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, Civil No. 22306

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

MACDONALD, SOMMER & FRATES

v.

THE COUNTY OF YOLO et al.

Appellant's petition for hearing DENIED.

BIRD

Chief Justice

C-1

APPENDIX C

EDWARD R. MACDONALD
MACDONALD & TERANISHI
1140 Pitt School Road, Suite B
Dixon, California 95620
(916) 678-2356
(707) 447-3115

HOWARD N. ELLMAN
SCOTT C. VERGES
ELLMAN, BURKE & CASSIDY
One Ecker Building, Suite 200
San Francisco, CA 94105
(415) 777-2727

Attorneys for Appellant and Petitioner

**IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
THE THIRD APPELLATE DISTRICT**

(Yolo)

MACDONALD, SOMMER & FRATES,
a partnership,

Plaintiff & Appellant,

v.

THE COUNTY OF YOLO and
THE CITY OF DAVIS,

Defendants & Appellees.

**3 Civ. No. 22306
NOTICE OF APPEAL
TO
THE SUPREME
COURT OF
THE UNITED STATES**

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that MacDonald, Sommer & Frates, a partnership, Plaintiff and Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered April 3, 1985, denying a hearing of the opinion of the Court of Appeal of the State of California, Third Appellate District.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ELLMAN, BURKE & CASSIDY
HOWARD N. ELLMAN
SCOTT C. VERGES
One Ecker Building
Suite 200
San Francisco, CA 94105

MACDONALD & TERANISHI
EDWARD R. MACDONALD
1140 Pitt School Road
Suite B
Dixon, CA 95620

Dated: June 24, 1985.

By /s/ HOWARD N. ELLMAN
Howard N. Ellman

*Attorneys for Plaintiff
and Appellant*

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am a United States citizen, over 18 years of age, and employed in the City and County of San Francisco, State of California. I am not a party to the within action. My business address is One Ecker Building, Suite 200, San Francisco, California 94105. On the date below written, I placed true copies of the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES in envelopes addressed as follows:

WILLIAM L. OWEN, ESQ.
MCDONOUGH, HOLLAND & ALLEN
A PROFESSIONAL CORPORATION
555 Capitol Mall, Suite 950
Sacramento, California 95814

P. LAWRENCE KLOSE, ESQ.
CITY ATTORNEY
CITY OF DAVIS
23 Russell Boulevard
Davis, California 95616

RICHARD SHERWOOD, ESQ.
MCDONALD, SEALTZER,
MORRIS & CAULFIELD
Attorneys at Law
555 Capitol Mall, Suite 700
Sacramento, California 95814

C. LEE HUMES, ESQ.
DEPUTY COUNTY COUNSEL
COUNTY OF YOLO
725 Court Street
Woodland, California 95695

which envelopes I sealed with first class postage fully prepaid thereon and deposited in the United States Mail at San Francisco, California on the date below written.

I declare under penalty of perjury that the foregoing is true and correct that this declaration was executed at San Francisco, California on June 24, 1985.

/s/ WENDELL A. FOSTER
Wendell A. Foster

APPENDIX D

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 1094.5. [Inquiry into validity of administrative order or decision]

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the

hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

CALIFORNIA EVIDENCE CODE

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

CALIFORNIA GOVERNMENT CODE

66426. Names types of projects requiring tentative and final maps; cites exclusions

A tentative and final map shall be required for all subdivisions creating five or more parcels, five or more condominiums as defined in Section 783 of the Civil Code, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except where:

(a) The land before division contains less than five acres, each parcel created by the division abuts upon a maintained public street or highway and no dedications or improvements are required by the legislative body, or

(b) Each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway, or

(c) The land consists of a parcel or parcels of land having approved access to a public street or highway which comprises part of a tract of land zoned for industrial or commercial development, and which has the approval of the governing body as to street alignments and widths, or

(d) Each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter of a quarter section.

A parcel map shall be required for those subdivisions described in subdivisions (a), (b), (c), and (d).

CALIFORNIA GOVERNMENT CODE

§ 65300. Preparation of plan: Adoption: Purpose

Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning.

APPENDIX E

FILED
YOLO COUNTY

OCT 27, 1981

PETER McNAMEE, Clerk

BY /s/ MARIA ORTIZ

Deputy

EDWARD R. MACDONALD
MACDONALD, TERANISHI & BESNEATTE
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Phone: (916) 678-2356

(707) 447-3115

Attorney for Plaintiff

SUPERIOR COURT OF CALIFORNIA, COUNTY OF YOLO

MACDONALD, SOMMER & FRATES,
A Joint Venture,

Plaintiff,

vs.

COUNTY OF YOLO, a political
subdivision of the State of
California; CITY OF DAVIS, a
Municipal Corporation; EL MACERO
SEWER ASSESSMENT DISTRICT, an
Agency of the COUNTY OF YOLO;
JOHN L. DAHLER, as Treasurer of
the County of Yolo,

Defendants.

NO. 36655

**FOURTH AMENDED
COMPLAINT FOR
DECLARATORY
RELIEF, DAMAGES
IN INVERSE
CONDEMNATION,
RECOVERY OF
TAXES AND
ASSESSMENTS,
AND VIOLATION OF
CIVIL RIGHTS
ACT OF 1871.**

Plaintiff complains of defendants and for its causes of
action alleges:

ALLEGATIONS APPLICABLE TO ALL CAUSES OF ACTION

A. THE PARTIES

Plaintiff is now and at all times relevant hereto was a joint venture validly formed and existing under the law of the State of California. All of the venturers in Plaintiff are individuals: they are Arch MacDonald, a resident of Santa Clara County, State of California, Ralph S. Sommer, a resident of Alameda County, State of California, and Frank V. Frates, a resident of Sacramento County, State of California.

2. Defendant County of Yolo ("County") is now and at all times relevant hereto was a political subdivision and a general law county of this State, charged with the duties and obligations and exercising the rights and privileges of such an entity under the Constitution and statutes of the State of California.

3. Defendant El Macero Sewer Assessment District ("District") is now and at all times relevant hereto was an agency and instrumentality of defendant County, established by County for the purposes *inter alia* of providing sewage collection treatment and disposal facilities and services to those properties located within its boundaries, including the Property owned by plaintiff which is the subject of this action.

4. Defendant John L. Dahler is Treasurer of defendant County and is charged by law for collecting, retaining and disbursing funds belonging to County, its agencies and instrumentalities.

5. Defendant City of Davis ("City") is now and at all times relevant hereto was a municipal corporation and a general law city of this State charged with the duties and obligations and exercising the rights and privileges of such an entity under the Constitution and statutes of the State of California.

B. FACTS APPLICABLE TO ALL CAUSES OF ACTION

(1) LOCATION, PHYSICAL CHARACTERISTICS OF THE SUBJECT PROPERTY AND BENEFICIAL USES THEREOF.

6. On or about October 12, 1971, Plaintiff acquired fee title to a certain parcel of real property (the "Property"), located in the County of Yolo, State of California. The Property is more particularly described in Exhibit A, attached hereto and incorporated herein by this reference. Plaintiff purchased the Property for good and valuable consideration. The Property lies within the boundaries of County, and outside the corporate boundaries of City. The boundaries of City are now contiguous with one boundary of the Property after a series of annexations. The Property is shown on the plat attached hereto, marked Exhibit B, and incorporated herein by this reference. The present corporate boundaries of City are also delineated on the plat as well as other boundaries and features more particularly described below.

7. Plaintiff is now and at all times relevant hereto was the owner of a second parcel of real property ("the Connecting Property") located in the County of Yolo, State of California. The Connecting Property is within the corporate boundaries of City and lies between the Property and the easternmost extension of Cowell Boulevard, a public street of the City. The Connecting Property is also shown on Exhibit B attached hereto.

8. The Property is generally flat. It lacks any unique scenic value, topographical or geographical features. It is not physically divided from neighboring property by any natural or man-made physical feature which would serve as an impediment to development. No soils, geologic, drainage or other conditions exists on the Property which would render development unfeasible or difficult. THE PROPERTY IS CURRENTLY SHOWN ON COUNTY'S GENERAL PLAN AND ZONED UNDER COUNTY'S ZONING ORDINANCES FOR USE AS A SINGLE FAMILY AND MULTIPLE RESIDENTIAL, a use for which the property has been designated on County's general plan and zoning ordinances since 1966.

9. The Property immediately adjoins land shown on Exhibit B which has been developed for single-family residential purposes. The Property also lies within approximately two hundred (200) yards of a parcel ("the Simmon's Parcel") shown on Exhibit B which has been approved for annexation to City and for immediate single-family residential use and development. In physical features and characteristics, the Property is indistinguishable from the Simmon's Parcel and other land upon which development has been permitted to proceed, except that the Property is actually inferior to most of these other lands in its capacity for agricultural use.

10. The Property is located within a regional community comprising City and its environs as well as an area commonly known as "East Yolo", "West Sacramento", and portions of Sacramento and Solano Counties. This region constitutes a single housing and socio economic unit. Persons employed within any portion of the region require housing therein. Centers of employment located therein create a demand for housing which may be filled by supplies of housing provided anywhere within the region. Currently, a severe shortage of housing of all types, but particularly single-family residential detached housing exists within the region. The Property is ideally suited for construction of such housing. City and County have a duty to permit and facilitate construction of such housing for the general welfare of all of the citizens affected by their actions.

11. The Property is not suitable for agricultural uses for a variety of reasons. Specifically, but without limitation, the fertile topsoil was removed from the property for use in constructing Interstate 80. At that time, the Property was expressly designated in County's general plan and applicable zoning ordinances for residential use. Removal of the topsoil was under express threat of condemnation. The soil is infested with nematodes which destroy crops; or to the extent that they do not bring about outright destruction, greatly increase farming expense. The proximity of residential development makes aerial application of pesticides and fertilizers impractical and sharply inhibits other methods of application. The proximity of

developed land thus would make cultivation economically unprofitable even if the Property had topsoil and no nematodes.

12. Provision of goods and services to the Property necessary for purposes of efficient residential development is physically possible and economically feasible. The Property is directly adjacent to the Connecting Property owned by plaintiff, which in turn is served by a developed public street which can readily be extended through the Connecting Property to serve the Property. For many years (as more particularly alleged below) the Property has been included within District for the express purpose of service by a sanitary sewage disposal system. Domestic water is available as are police and fire protection services on immediately adjoining property. As more particularly alleged below, however, City and County have (i) denied all access to the Property from existing developed public streets by refusing to permit connection thereto, (ii) deprived the Property of the benefits of sanitary sewage disposal service notwithstanding that Plaintiff and its predecessors in interest have paid assessments for such service for many years, (iii) denied that available domestic water exists despite proven sources of supply on the Property and nearby adequate for serving the Property, and (iv) refused to permit provision of fire and police protection services to the Property even though such services could be provided for a lesser amount than the tax revenues generated from development of the Property to pay for said services and the services could feasibly be provided by expansion of governmental entities immediately adjoining the Property. As a result, County and City have deprived the Property of any beneficial use which is not (a) economically infeasible, (b) prohibited by law, or (c) prevented by actions taken by City and County. Specifically, but without limiting the generality of foregoing, the Property cannot be utilized for any of the beneficial uses enumerated in Yolo County Code Section 8-2.502 or Yolo County Code Section 8-2.504 or for any other use permitted or allegedly permitted, as a result of the action of County as hereinafter alleged.

13. But for the actions of defendants, herein alleged, the Property could be beneficially used for residential development. The highest and best use of the Property is for single-family and multiple residential purposes.

(2) PUBLIC ACTIONS AFFECTING USE OF THE PROPERTY PRIOR TO JANUARY 1, 1976.

(a) SEWER AND DRAINAGE IMPROVEMENTS

14. By the actions alleged in this Section, City and County and District have unlawfully acted to deprive the Property of sanitary sewage and storm drainage service, after City, County and District had first determined to provide such service and that provision of such service was feasible, and after levying and collecting substantial assessments against the Property for construction of sanitary sewer and storm drainage improvements in express contemplation of residential development. In deciding to deprive the Property of such services, City, County and District have acted for the express purpose of implementing a land-use control policy restricting the Property to an open-space agricultural use by denying all permit applications, subdivision maps and other requests to implement any other use which applicable zoning or general plans might permit.

15. On or about October 16, 1961, the Board of Supervisors of County, by resolution No. 61-132, created District for the purpose of assessing lands to raise funds for construction of a sanitary sewage treatment plant and related facilities. The Property was included within the lands to be assessed and served by the improvements to be constructed with the assessment proceeds. Thereafter, in 1966, City procured annexation of approximately 760 acres of land lying within District and assumed responsibility for governmental services formerly provided therein by County. These included certain governmental services for the Property. On or about October, 1968, the El Macero County Service Area was created by resolution of the Board of Supervisors of County to perform certain maintenance services with respect to improvements constructed with the proceeds of District assessments.

16. In 1970, City created Davis Municipal Sewer Facilities No. 1 and undertook jointly with District to construct a sewer interceptor line and related drainage facilities to serve the area allegedly benefited, which area included the Property. On or about April 27, 1972, City, acting for itself and as agent for County and District, filed a certain "Application for Grant

Contract" with the United States Environmental Protection Agency ("EPA") and the California State Water Resources Control Board ("State Water Board") seeking state and federal funds to assist in constructing the sewer and drainage improvements. In that application, City, with the knowledge and consent of County and District, represented to the State Water Board and the EPA that the improvements to be constructed within District were intended to serve a population calculated by assuming development of the Property.

17. In December of 1973 and continuing through 1974, City, County and District revised the sewer project in various ways. Among other things, they adjusted the boundaries of the area to be served (and pursuant thereto adopted and executed Agreement 74-214) so as to exclude the Property from service and redesigned the proposed project improvements, reducing their size and service capabilities. These changes were concurrent with adoption of an amendment to the Davis General Plan: (i) revising downward projected population growth; (ii) reducing the maximum ultimate population of District; and (iii) adopting the restrictive and parochial policies which violate City's duty to provide for regional housing need. Although County did not correspondingly revise its General Plan and zoning ordinances and although the Property remained in the County, County agreed with City to implement City's illegal policies as more particularly described below.

18. Notwithstanding their reduction of the population to be served by the sewer project, the revision of the service area boundaries and the revision in the proposed project improvements reducing their size and service capabilities, City, on behalf of County, District and itself, pressed their application for state and federal grant funds with the EPA and the State Water Board, using the original population figures, boundaries and proposed improvements. In so doing, County, City and District made express representations to federal and state authorities, which County, City and District knew to be false, in order to obtain funds to which City, County and District would not otherwise be entitled. While maintaining to State and Federal authorities that they intended to serve a certain level of population and area, including population to reside on the Property, City, County and District had decided to prevent any

such development from ever taking place. In so doing, City, County and District conspired in a scheme to defraud the State and Federal Government.

19. From the date District was formed until now, Plaintiff has paid approximately Seventy-Five Thousand Dollars (75,000) in assessments to District with respect to Property. Plaintiff will seek leave to amend this Complaint when the exact amount of assessments paid to District with respect to the Property has been ascertained. The assessments were levied expressly on the basis that the Property would be benefited by use of the improvements to be constructed by or for District. Since that time, however, City, County and District have acted deliberately and intentionally to prevent the Property from being developed so as to make use of, and to realize the benefits of, the improvements for which the Property has been and is still being assessed. Thus, there has been a total failure of consideration for the assessments and a complete deprivation of the use and benefit to the Property on which they were based.

(b) DENIAL OF ALL BENEFICIAL USE FOR THE PROPERTY IN ORDER TO APPROPRIATE THE PROPERTY FOR OPEN-SPACE AND GROWTH LIMITATION USES

20. On or about April 5, 1975, Plaintiff filed an application for approval of a subdivision map with County, seeking permission to subdivide the Property into one hundred fifty-nine (159) residential lots and to construct all public improvements required to serve the subdivision in accordance with the terms of the California Subdivision Map Act and the subdivision ordinances of County. Plaintiff's application complied in all respects with all applicable laws, and provided for design and improvement of the sub-division in accordance with County standards. In its application and thereafter, Plaintiff demonstrated the ability to provide public access by public streets, adequate water, sewer and other public utility services.

21. In response to Plaintiff's application, City undertook several acts for deliberate and avowed purpose of preventing County from approving Plaintiff's application. Among other things, City:

(a) Advised County that the Property had been duly designated "Agricultural Preserve" and more recently "Agricultural Reserve" on City's applicable General Plan Map, a statement which, Plaintiff alleges on information and belief, was false when made. Plaintiff further alleges on information and belief that the statement was known to be false by the person who made it (City's Director of Community Development) and that it was made for the purpose of preventing County's approval of Plaintiff's subdivision;

(b) Approved a subdivision map on the Simmon's Parcel shown on Exhibit B conditioned upon that Parcel's annexation to the City and upon development of a street configuration thereon which would deprive the Property of access to public streets;

(c) Refused to accept dedication of portions of the Connecting Property for the purpose of extending Colwell Boulevard as a dedicated public street to serve the Property, refused to permit said Boulevard's extension to the Property as a private road, and refused to permit County or any other governmental entity to extend and/or maintain said Boulevard on the Connecting Property; and

(d) Announced that it would refuse to accept dedications of public facilities, refuse to accept annexation of the Property and refuse to provide any City services thereto.

In making these statements and representations, City purported to be acting pursuant to a policy of preserving "prime agricultural lands" and for purposes of preventing development of lands for which there are no immediately available City services. At times past and present, however, City has permitted development of other properties for which such services were not immediately available, and both City and County have acted to facilitate development of other properties which were usable as prime agricultural lands, a use to which the Property is not suited. City's and County's positions are inconsistent, discriminatory, arbitrary and unreasonable. They reflect an attitude of inflamed prejudice rather than rational implementation of governmental policy. Their actions constitute a deprivation of access to the Property, and a taking of

the Property for public purposes; as an open space buffer and growth cap against regional growth needs emanating from the East Yolo and West Sacramento area, in violation of Article I, Section 19 of the California Constitution.

22. Although the Property lies outside the boundaries of City, County implements City policy with respect to the Property. Sometime during 1975, County formally stated the policy of refusing to permit development except within the boundaries of incorporated cities. County applies this policy unevenly, permitting development to proceed within the El Macero County Services Area and in other unincorporated portions of the "East Yolo" region. County has applied the policy with respect to the Property, however, and with respect to certain other lands in the vicinity of City. In so doing, County has unlawfully delegated its planning and land-use regulatory functions and responsibilities to City, and has unlawfully abrogated its own General Plan and zoning ordinances.

23. BY MINUTE ORDER DATED JUNE 14, 1977, COUNTY REJECTED PLAINTIFF'S APPLICATION FOR SUBDIVISION OF THE PROPERTY AND ADOPTED A FINAL NOTICE OF DETERMINATION AND FINDINGS, DECISIONS AND ORDER ON APPEAL, A TRUE AND CORRECT COPY OF WHICH IS ATTACHED HERETO, MARKED EXHIBIT C AND INCORPORATED HEREIN BY THIS REFERENCE. This Minute Order was adopted after a hearing by the Board of Supervisors of County to consider an earlier Notice of Determination and Findings, Decisions and Order on Appeal, a true and correct copy of which is attached hereto, marked Exhibit D, and incorporated herein by this reference. This Minute Order of June 14, 1977 represents County's final action in the subdivision proceedings herein described. Representatives of City appeared throughout the subdivision proceedings before County and maintained the spurious, unlawful and fraudulent positions above described.

24. IN DENYING PLAINTIFF'S SUBDIVISION APPLICATION, COUNTY DETERMINED THAT THE PROPERTY COULD ONLY BE USED FOR AGRICULTURAL PURPOSES, WHILE ACKNOWLEDGING THAT THE PROPERTY IS AGRICULTURALLY IMPAIRED, AND DENIED TO PLAINTIFF ANY OTHER USE THEREOF NOTWITHSTANDING THAT PLAINTIFF'S SUBDIVISION MAP PROPOSED A USE EXPRESSLY PERMITTED BY COUNTY'S GENERAL PLAN AND ZONING ORDINANCES.

In reaching its conclusion County applied the policy of City relegating the land to agricultural uses. Such a land-use designation deprives Plaintiff of the entire economic use of the Property for the sole purpose of appropriating the land to a public, open-space buffer use for the benefit of City, to carry out a deliberate policy in direct derogation of the obligation of City and County to provide for housing to meet regional housing needs.

25. In determining that Plaintiff's land could only be used for agricultural purposes, notwithstanding its general planning and zoning designation for residential use and its suitability therefor, County determined that (i) the Property lacked access by means of suitable public streets, a condition resulting from City's deliberate refusal to permit or approve available access; (ii) the property lacked sanitary sewer service, a condition resulting directly from the wrongful acts of City, County and District above alleged, (iii) the Property lacked adequate water supply, a finding directly contrary to the fact (in evidence before County) that there are proven sources of supply on the Property and in the vicinity thereof which serve the immediately adjacent residential areas, and (iv) that the Property lacked adequate fire and police services, conditions attributable in part to refusal on part of County and City to provide such services.

26. Under the conditions established by County, City and District which deny access, sanitary sewage disposal, deny the existence of an adequate water supply and refuse, police and fire protection services, none of the beneficial uses enumerated in the Yolo County Code in agricultural areas would be suitable for the Property and provide the Property with a beneficial use, even if the Property was zoned for agricultural use, which it is not. Specifically, the Property is not suited for the uses enumerated in the Yolo County Code for the reasons set forth after each use.

I. YOLO COUNTY CODE, SECTION 8-2.502:

Use Permitted:

"(a) Agriculture, including any customary agricultural buildings and structures, and such uses as, but not

limited to, livestock ranges, animal husbandry, field crops, tree crops, nurseries and greenhouses, together with all necessary equipment and facilities for the support and maintenance of the operation, and other agricultural occupations as defined in Section 8-2.208 of Article 2 of this Chapter."

Property Not Suitable For Such Use Because:

(i) no topsoil; (ii) nematode infestation; (iii) proximity of residences precludes aerial pesticide application; (iv) City denies access; (v) City, County and District deny sanitary sewage service; (vi) City and County deny available water service; (vii) City and County deny police and fire protection.

Use Permitted:

"(b) Dwellings, ranch and farm, appurtenant to a principal agricultural use."

Property Not Suited For Such Use Because:

(i) use is ancillary to agricultural use to which the Property is not suited for the reasons set forth above; (ii) City and County deny available water service; (iii) City and County deny required police and fire protection services.

Use Permitted:

"(c) Electrical distribution substations."

Property Not Suitable For Such Use Because:

(i) use is ancillary to an agricultural use to which the Property is not suited for the reasons set forth above; (ii) City and County deny required police and fire protection services.

Use Permitted:

"(d) Hunting clubs, public and private."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny fire and police protection services; (iii) City, County and District deny sanitary disposal; (iv) proximity to residential property renders discharge of firearms unsafe and/or illegal; (v) hunting club is not a beneficial use in an area of close proximity to residences where there is no game—which is the case with respect to the Property.

Use Permitted:

"(e) Oil and gas well drilling and operation."

Property Is Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny fire and police protection services; (iii) proximity to residential property renders oil and gas well drilling inappropriate on the Property because of the hazards associated therewith and offensive odors emanating therefrom; (iv) surveys and tests disclose no reasonable likelihood that oil and gas deposits are present on the Property.

Use Permitted:

"(f) Parks and recreation areas, public."

Property Is Not Suitable For Such Use Because:

(i) City and County deny access, (ii) City and County deny available water service; (iii) City and County deny police and fire protection.

II. YOLO COUNTY CODE, SECTION 8-2.504:

The Property cannot be utilized for any of the uses permitted pursuant to Yolo County Code Section 8-2.504 for the following reasons:

Use Permitted:

"(a) Agricultural, chemicals manufacture and storage."

Property Not Usable For Such Purpose Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) use is hazardous next to residential area.

Use Permitted:

"(b) Agricultural processing plants."

Property Not Suitable For Such Purpose Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(c) Agricultural products storage plants and yards."

Property Is Not Suited For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(d) Airports and landing strips, private."

Property Not Suitable For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) use not acceptable in close proximity to residences and existing El Macero airstrip is being phased out for that reason.

Use Permitted:

"(e) Animal hospitals and sales yards."

Property Not Suitable For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) use not acceptable in close proximity to residences due to odors, noise, etc.

Use Permitted:

"(f) Animal hospitals, veterinary offices and kennels."

Property Not Suitable For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) no conceivable market for such use or service close to the facilities at the University of California at Davis.

Use Permitted:

"(g) Buildings and structures, public and quasi-public and uses of an administrative, educational, religious, cultural, or public service type."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(h) Cemeteries, crematories, mausoleums and columbariums."

Property Not Suitable For Such Uses Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(i) Electrical transmission substations, communication equipment buildings and public utility service yards."

Property Not Suitable For Such Uses Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(j) Fertilizer plants and yards."

Property Not Suitable For Such Uses Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) proximity to residential area renders this use unfeasible.

Use Permitted:

"(k) Forest products manufacturing and processing plants."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) proximity to residential area renders this use unfeasible.

Use Permitted:

"(l) Hog farms."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) proximity to residential property; (iii) use generates noxious fumes and odors.

Use Permitted:

"(m) Labor camps."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) proximity to residential property; (iii) City and County deny available water service; (iv) City, County and District deny sanitary sewage service; (v) City and County deny police and fire protection.

Use Permitted:

"(n) Mines, quarries and gravel pits, commercial."

Property Not Suited For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; and (v) use generates noise, dust and traffic incompatible with nearby residential use.

Use Permitted:

"(o) Riding stables."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

WITHOUT LIMITATION BY THE FOREGOING ENUMERATION, THE CONSTRAINTS IMPOSED BY COUNTY AND CITY ABSOLUTELY PRECLUDE ANY DEVELOPMENT OR BENEFICIAL USE OF THE PROPERTY FOR ANY PURPOSE OF ANY KIND WHATSOEVER. THE WILLFUL AND DELIBERATE NATURE OF COUNTY'S AND CITY'S ACTION DISREGARDING EXISTING GENERAL PLAN DESIGNATIONS AND ZONING TO CARRY OUT THE POLICY OF CITY PRECLUDING DEVELOPMENT OF THE PROPERTY DEMONSTRATES THAT ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE.

27. Plaintiff has exhausted all of its administrative remedies. In view of Government Code § 905.1, no claims need be presented prior to this action as a precondition to the filing or maintenance hereof.

FIRST CAUSE OF ACTION: DECLARATORY RELIEF

28. Plaintiffs repeat as if fully set forth each and every allegation contained in paragraphs 1-27 inclusive hereinabove.

29. Plaintiff contends, and Defendants deny, that restriction of the Property to agricultural use constitutes an abuse of County's and City's police power for the following reasons:

- (a) It deprives the Property of all beneficial use and thus appropriates for a public purpose its entire economic value;
- (b) The decision was undertaken in direct derogation of the general health, safety and welfare County and City are required to serve in that it carries out an exclusionary housing policy of City contrary to County's own general plan and zoning ordinances, taking actions which adversely affects the supply and distribution of housing within the region in the face of a severe and growing housing shortage; and
- (c) In denying Plaintiff's subdivision map, County refused to apply its own general plan and zoning ordinances and instead applied policies enunciated by officers of City, purporting to carry out City policies not properly codified or applicable to the Property, and, in many cases, discriminatory on their face.
- (d) Defendants may not apply to Plaintiff any of the policies and practices challenged in this action, which prevent Plaintiff from developing the Property in order to realize the special benefits of the sewer assessments paid by Plaintiffs.

30. Plaintiff further contends, and Defendants deny, that Defendants, and each of them, have intentionally deprived Plaintiffs of any access to the Property which is suitable for residential development, so as to further said Defendants' scheme to appropriate the Property for a public purpose without payment of compensation.

31. An actual controversy which is ripe for declaratory relief exists between the parties in that City and County believe they may lawfully restrict the use of the Property and deprive Plaintiff of access thereto in the manner herein alleged without payment of compensation to Plaintiff; and Plaintiff contends that City's and County's actions imposing restrictions upon Plaintiff's use of the Property and depriving Plaintiff of access thereto are unlawful and constitute an appropriation of the Property for a public purpose in violation of Article I, Section 19 of the California Constitution, and the 5th and 14th Amendments to the U.S. Constitution.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

SECOND CAUSE OF ACTION: DAMAGES IN INVERSE CONDEMNATION

32. Plaintiffs repeat as if fully set forth each and every allegation contained in paragraphs 1-31 inclusive hereinabove.

33. DENIAL OF PLAINTIFF'S APPLICATION FOR APPROVAL OF A SUBDIVISION MAP, AS HEREINABOVE ALLEGED, REPRESENTS THE CULMINATION AND END PRODUCT OF COUNTY'S AND CITY'S JOINT POLICY, PRESENTLY AND FOR THE FORESEEABLE FUTURE, TO RESTRICT THE PROPERTY TO USES FOR WHICH THE PROPERTY IS NOT SUITED. Imposition of the restrictions mandating such use permanently deprives Plaintiff of the entire economic value and beneficial use of the Property. The restrictions of the Property alleged herein were imposed by City and County for the public purpose of creating an open space area for the use, benefit and enjoyment of City and County. The imposition of such restrictions upon the Property constitutes a damage to or taking of the Property for a public purpose without compensation in violation of Article I, Section 19 of the Constitution of the State of California and the 5th and 14th Amendments to the U.S. Constitution.

34. The restrictions which have been applied to the Property in this case have purportedly been implemented through the procedures specified in the Subdivision Map Act. In applying the procedures, however, County, acting for itself and for City, carried out a larger policy which became evident

when City, County and District acted in concert to amend and redesign the service area of District to exclude the Property. Notwithstanding contrary statements and misrepresentations to the EPA and State Water Board, City, County and District have deliberately excluded the Property from service by public facilities essential thereto since approximately December 1973. Continuation of the restrictions, applied through implementation of uncodified policies, in derogation of County's general plan (and while stating a contrary intent to public officials at the State and federal level) has placed the use of Plaintiff's Property under an unreasonable restriction for an unreasonable period of time. For all practical purposes, the restriction (which wrongfully denies sewer service to the Property) is now permanent.

35. The Property lies within the boundaries of County and outside the boundaries of City. In imposing the restrictions which have deprived the Property of its entire economic value, however, County has acted at the special instance and request of City, applying policies of City which are unreasonable, discriminatory and unlawful on their face. County and City have acted jointly to impose those policies upon the Property and have acted in concert not only in connection with the imposition of land-use restrictions but in their unlawful scheme to deprive Plaintiff of the right to use improvements constructed by or for District notwithstanding that Plaintiff has paid large assessments for use of those improvements on the continuing representation that they would be available for development on the Property. City and County have acted in concert in making misrepresentations to state and federal officials in connection with their attempts to obtain funding to assist in construction of the improvements to be constructed in District. Because of their joint acts in imposing the restrictions upon the Property, which deprives the Property of all economic value, City and County should be held jointly and severally liable for the damages required to be paid to Plaintiff herein in inverse condemnation under Article I, Section 19 of the California Constitution and the 5th and 14th amendments to the U.S. Constitution.

36. The highest and best use of the Property is for single-family and multiple residential purposes. Plaintiff's proposed subdivision represents a realistic, workable, acceptable and

economic implementation of that use in accordance with all applicable laws, ordinances, rules, regulations and prudent development standards.

37. Plaintiff is informed and believes and thereon alleges that the fair market value of the Property at its highest and best use, as above alleged, is One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00). The Property, as presently restricted, has no fair market value.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

THIRD CAUSE OF ACTION: DAMAGES FOR DEPRIVATION OF ACCESS

38. Plaintiff repeats as if fully set forth each and every allegation contained in paragraphs 1-37 inclusive hereinabove.

39. City and County have intentionally deprived Plaintiff of any access to the Property suitable for residential development and have used this artificially-created lack of access as a pretext for denying Plaintiff approval to subdivide and develop the Property.

40. Said deprivation of access constitutes a damage to or taking of the Property for a public purpose without compensation in violation of Article I, Section 19 of the California Constitution, and the 5th and 14th Amendments to the U.S. Constitution. The exact amount of said damage is presently unknown to Plaintiff who prays leave to amend this complaint when said amount has been ascertained.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

FOURTH CAUSE OF ACTION: RECOVERY OF ASSESSMENTS; DUE PROCESS

41. Plaintiff repeats as if fully set forth each and every allegation contained in paragraphs 1-40 inclusive hereinabove.

42. The assessments paid by Plaintiff to District for the Property were paid upon the basis of official proceedings in which it was determined that the Property would be benefited by construction of sanitary sewer and drainage improvements to serve the Property. The assessments were levied to pay for improvements proposed for the express purpose of facilitating development upon the Property and other lands. Having received the benefit of the assessments for many years in the approximate amount of Seventy-Five Thousand Dollars (\$75,000), or more, City, County and District have now adopted the policy of precluding development upon the Property.

43. In the proceedings described in paragraphs 14 and 15 above, resulting in the formation of District, the imposition of assessments on the Property, and the planning of sewage and drainage facilities to be constructed with assessment funds, Plaintiff and its predecessors in interest were induced to refrain from protests, appeals, or other form of legal challenge to the proceedings by the representations of City, County and District that the Property would be included in the service area and would be permitted to be developed. Plaintiff and its predecessors in interest relied upon these representations, and but for them would not have so refrained from protest. City, County and District breached those representations only after the time had long expired for all usual forms of judicial review of the proceedings.

44. In excluding the Property from the sewage and drainage service as alleged in paragraph 16, City and County acted in furtherance of their policy to prevent Plaintiff's beneficial use of the Property. City and County had no valid reason or motivation for the exclusion other than to provide a superficial excuse for denial of residential development upon the Property, as exemplified by County's denial of Plaintiff's subdivision map application, and thereby to effect the taking of the Property for their own benefit as previously alleged.

45. California law provides a mechanism for judicial review of assessment proceedings, contest of assessments and recovery of assessments unlawfully collected. In this instance, however, the assessments were collected at a time when the assessment proceedings expressly contemplated construction of

improvements to serve the Property. Now that the improvements have been revised to eliminate such service and development of the Property has been prevented, Plaintiff's cause of action for restitution has arisen for the first time. Defendant's retention of Plaintiff's assessment payments without any opportunity for Plaintiff to obtain judicial review of said Defendants' refusal to permit Plaintiff to realize the special benefits on which they were based deprives Plaintiff of its property without due process of law, in violation of both the United States and California constitutions. Plaintiff is entitled to have and recover of Defendants the full amount of said assessments, together with interest thereon at the legal rate.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

FIFTH CAUSE OF ACTION: RECOVERY OF ASSESSMENTS: CONTRACT

46. Plaintiff realleges and incorporates herein by reference paragraphs 1-45 above.

47. The proceedings described in paragraphs 14 and 15 above resulted in written contractual obligations among City, County and District of which Plaintiff and its predecessors in interest were intended to be, and were, third party beneficiaries. By the representations alleged in paragraphs 16-18 above, City County and District induced Plaintiff and its predecessors in interest to rely upon those obligations and to change their position in reliance on those obligations, as alleged in paragraphs 42-45 hereinabove. By subsequently excluding the Property from the service area for spurious and unlawful reasons as above alleged, City, County and District breached those obligations to Plaintiff's damage.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

SIXTH CAUSE OF ACTION: RECOVERY OF ASSESSMENTS: UNJUST ENRICHMENT

48. Plaintiff realleges and incorporates herein by reference paragraphs 1-47 above.

49. To permit City, County and District to retain the benefit of assessments collected on such a basis would work a forfeiture against Plaintiff, unjustly enrich City, County and District and exact from Plaintiff the cost of public improvements in substantial excess of any special benefits accruing to Plaintiff.

**SEVENTH CAUSE OF ACTION:
DAMAGES FOR VIOLATION OF CIVIL RIGHTS ACT
OF 1871**

50. Plaintiff realleges and incorporates herein by reference paragraphs 1-49 above.

51. The results of City's and County's actions and zoning regulations is as is more specifically alleged above, to deprive Plaintiffs of any economically viable use of the Property through restrictions on Plaintiffs' use of the Property to agricultural reserve open space, which results in a taking of Plaintiffs Property for public use without just compensation. U.S. Constitution, Amendments 5, 14; 42 U.S.C. §1983.

WHEREFORE, Plaintiff respectfully requests the judgment of this Court:

1. Declarating that City and County's restrictions upon the use of Plaintiff's Property and their deprivation of access to said Property constitute an unlawful damaging and/or taking of the Property for a public purpose without compensation in violation of Article 1, Section 19, of the California Constitution.

2. A declaration that City's and County's policies and practices restricting the use of Plaintiffs' Property may not validly be applied to Plaintiff so as to prevent Plaintiff from developing the Property and realizing the special benefits of the sewer and drainage improvements for which the Property has been assessed.

3. Awarding Plaintiff damages in the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) against City and County, jointly and severally, as compensation for the taking of Plaintiff's Property for a public purpose in violation of Article 1, Section 19 of the California Constitution.

4. Awarding plaintiff damages in the amount shown by proof against City and County, jointly and severally, as compensation for the deprivation of access to plaintiff's property.

5. Ordering City, County, District and Treasurer to repay to Plaintiff all assessments paid to District with respect to the Property for construction of sanitary sewer and drainage improvements, together with interest from the dates of payment at the legal rate.

6. Awarding Plaintiff damages in the amount shown by proof against City and County, jointly and severally, as compensation for the violation of 42 U.S.C. §1983, by the taking of Plaintiffs Property without just compensation.

7. Awarding Plaintiff its costs of suit herein, including a reasonable attorneys' fee.

8. Granting Plaintiff such other and further relief as this court deems just and proper.

DATED: October 15, 1981.

/s/

Edward R. MacDonald
Attorney for Plaintiff.

MOTION

2
No. 84-2015

Supreme Court, U.S.

FILED

AUG 23 1985

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1984

—————o—————
MacDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

—————o—————
On Appeal From The Supreme Court Of California

—————o—————
MOTION TO DISMISS APPEAL

—————o—————
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33170

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No. 84-2015

In The
Supreme Court of the United States
October Term, 1984

MacDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL

PRELIMINARY STATEMENT

Appellant, MacDONALD, SOMMER & FRATES, a partnership, appeals from an unpublished decision of the Court of Appeal of California filed on January 24, 1985. Appellant's petition for a hearing before the Supreme Court of California was denied on April 3, 1985.

This motion to dismiss the appeal is jointly filed on behalf of appellees COUNTY OF YOLO ("County") and CITY OF DAVIS ("City"). Appellees contend that this Court does not have jurisdiction of this appeal and that the appeal should be dismissed. Should the Court consider appellant's papers as constituting a writ of certiorari, appellees contend that such a writ should be denied.

STATEMENT OF THE CASE

Appellant is the owner of a forty-four acre parcel of agricultural property situated within an unincorporated area of the County located east of the City. The property was acquired by appellant in 1971.¹ (Complaint, AJS E-3.) This forty-four acre parcel is zoned single family and multiple residential by the County. (Complaint, AJS E-3.) Appellant is also the owner of a fifteen acre rectangular strip of property located partially in the City which it has denominated as the "connecting property." (AJS 4.)

In approximately 1974, the City revised its general plan to show appellant's property as agricultural reserve except for a portion of the connecting property located within the city limits. (Complaint, AJS E-7.) Prior to June 14, 1977, appellant submitted a tentative subdivision map to the County for the property. (Complaint, AJS E-8, E-10.) After hearings and review, the appellant's

¹References to the Court of Appeal opinion and appellant's jurisdictional statement are abbreviated as follows: Court of Appeal opinion, "CA"; Appellant's Jurisdictional Statement, "AJS."

tentative subdivision map was denied by the County's Board of Supervisors ("Board") on June 14, 1977.² (Complaint, AJS E-10.)

The Board specifically found that appellant's proposed subdivision would have a significant adverse impact upon the environment (App. 2-3); that a residential subdivision on appellant's property would render cultivation of agricultural land in the vicinity of appellant's property unfeasible (App. 4); that appellant had not provided access to the proposed subdivision by a public street (App. 5); that appellant had not provided for sewer service by any governmental entity, and had not undertaken any actions to annex to a sewer service area (App. 6); that no provision had been made for public water (App. 7); and that petitioner's proposal to provide sole access to the subdivision by means of a 1300 foot extension of Cowell Boulevard would constitute a danger to the public health. (App. 8.) For these and other reasons the Board found that the proposed subdivision was inconsistent with the County's general plan. (App. 11.)

In its fourth amended complaint filed on October 27, 1981, appellant sought, *inter alia*, damages based on inverse condemnation, denial of access and deprivation of civil rights under 42 U.S.C. § 1983. Appellant also filed a separate lawsuit seeking to overturn the Board's action by a writ of administrative mandate.³ The administrative man-

²The County Board's notice of findings, decisions and order on appeal is Exhibit C to appellant's fourth amended complaint and is incorporated therein. This document is attached to this motion as the Appendix.

³Cal. Civ. Proc. Code § 1094.5 (West Supp. 1985).

date action is still pending before the trial court. (CA, AJS A-7.)

Appellees' demurrers to the fourth amended complaint were sustained by the trial court without leave to amend. Appellant appealed from the judgment of dismissal as to the second ("damages in inverse condemnation"), third ("damages for deprivation of access") and seventh ("civil rights") causes of action.

In its unpublished opinion filed on January 24, 1985, the Court of Appeal, Third Appellate District, State of California, affirmed the judgment of dismissal. Appellant's petition for a hearing before the Supreme Court of California was denied.

ARGUMENT

I

Jurisdiction Is Not Present Under 28 U.S.C. § 1257(2)

Appellant claims this Court has jurisdiction under 28 U.S.C. § 1257(2). (AJS 2.) This statute states in relevant part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

....

(2) By appeal, where is drawn in question the validity of a *statute of any state* on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. §1257 (emphasis added).

It is clear that § 1257(2) requires that the constitutionality of a state statute be in question, and that the state court has ruled in favor of the constitutionality of the state statute before an appeal will lie. Appellant's jurisdictional statement in this case does not present such an issue. The federal questions as articulated by the appellant do not include the claimed unconstitutionality of a state statute. Such a claim must not only be made by the appellant, but the state court must have specifically rejected the claim. Neither component has been demonstrated by the appellant herein. The appeal must be dismissed.

Appellant also cites the Court to numerous zoning and land use cases claiming that jurisdiction is present in this case because the Court found jurisdiction in the cases cited. (AJS 3.) All of the cases cited by the appellant however, dealt either with the unconstitutionality of specific municipal ordinances or state statutes.⁴ Appellant makes no such claim in this case.

The phrase "statute of any state" which is contained within § 1257(2) has been construed by this Court to include every act legislative in character to which the state

⁴Jurisdiction was granted on appeal to this Court in the cases cited by appellant because the constitutionality of a specific municipal ordinance or state statute was in issue: *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (city ordinance); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (city zoning ordinance); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (city landmark preservation law); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (municipal ordinance); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (city ordinance); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (city zoning ordinance); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (state statute).

gives sanction. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 257-58 (1934); *Lathrop v. Donohue*, 367 U.S. 820, 824-25 (1961). To fall within this construction, however, the governmental act must be legislative in character. The acts complained of by appellant are not legislative in character.

As indicated in their jurisdictional statement, appellant contends that the County's action in denying the tentative subdivision map and City's express opposition to the subdivision map constitutes a taking of appellant's property without just compensation.⁵ Under California law, the denial or approval of a tentative subdivision map is a quasi-judicial act, not a legislative act.⁶ Therefore, the acts which appellant alleges were unconstitutional do not give rise to jurisdiction under § 1257(2).

This Court's jurisdiction must be premised upon a decision of a state court upholding a state statute or legislative act against a constitutional attack. This Court has held that statutes authorizing appeals are to be strictly construed. *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 43 (1983); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). The California Court of Appeal in our case did not uphold a legislative act sanctioned by the state against a constitutional attack. (CA, AJS Appendix A.) Accordingly, this Court does not have jurisdiction over this appeal.

⁵Appellant admitted in its briefs before the Court of Appeal that it was not challenging the constitutionality of County's zoning ordinances, County's general plan or City's general plan.

⁶*Youngblood v. Board of Supervisors*, 22 Cal.3d 644, 651 n.2 (1978); *McMillan v. American Gen. Fin. Corp.*, 60 Cal.App.3d 175 (1976).

This Court has consistently denied jurisdiction in cases where an appellant claims denial of a constitutional right, but where the state court does not uphold a state statute against a constitutional attack. In *Kulko v. Superior Court of California*, 436 U.S. 84 (1978) the Court held that jurisdiction by appeal would not lie finding that the appellant had not attacked the constitutionality of the state's in personam jurisdiction statute in the state court, but instead had argued that his due process rights under the Fourteenth Amendment precluded the assertion of in personam jurisdiction over him. The state court decision did not determine whether or not California's jurisdictional statute was constitutional. Other decisions are in accord. *Addington v. Texas*, 441 U.S. 418 (1979); *Raley v. Ohio*, 360 U.S. 423, 435 (1959); *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

Because the decision of the Court of Appeal of California does not uphold a state statute against a constitutional attack, this Court has no jurisdiction to accept this appeal. The appeal should be dismissed.⁷

II

This Court Does Not Have Jurisdiction Because The State Court Judgment Rests On Adequate State Grounds

This Court has adopted the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). In our case the trial court ruled that the ap-

⁷If the Court should deem appellant's papers to constitute a writ of certiorari under 28 U.S.C. § 2103, then the writ should be denied for the reasons articulated in parts II and III of this motion, *infra*.

pellant had failed to exhaust its administrative remedies in respect to each cause of action. The trial court also ruled that the County Board of Supervisors' denial of the tentative subdivision map was res judicata and not subject to collateral attack in the second and third causes of action. (CA, AJS A-5.)

The Court of Appeal did not reach the issues of exhaustion of administrative remedies or res judicata, finding that the complaint did not allege facts sufficient to constitute a cause of action. Under California law, exhaustion of administrative remedies is a jurisdictional requirement for suit. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292 (1941); *Woodard v. Broadway Fed. S. & L. Ass'n*, 111 Cal.App.2d 218, 220 (1952); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal. App.3d 82, 88 (1978).⁸ Because it denied a hearing in this case, the California Supreme Court did not address the exhaustion of administrative remedies or res judicata issues.

This Court has also held that where the highest court of a state delivers no opinion and it appears that the state court judgment might have rested upon a non federal ground, that the United States Supreme Court will not take jurisdiction to review the judgment. *Stembridge v. Georgia*, 343 U.S. 541 (1952). In *Stembridge v. Georgia* the Court held that the writ of certiorari had been improvidently granted, and dismissed the case. The Court found that the Supreme Court of Georgia might have rested its order on a non federal ground. The Court stated: "We

⁸In California subject matter jurisdiction is a statutory ground upon which a demurrer to a complaint will be sustained. Cal. Civ. Proc. Code § 430.10 (West Supp. 1985).

are without jurisdiction when the question of the existence of an adequate state ground is debatable." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). See also *Bachtel v. Wilson*, 204 U.S. 36 (1907); *Hedgebeth v. North Carolina*, 334 U.S. 806 (1948).

Inasmuch as the trial court in this case based its decision on failure to exhaust administrative remedies and res judicata principles, the California Supreme Court, if it had granted a hearing in the case, might have rested its opinion upon non federal grounds, i.e., exhaustion of administrative remedies or res judicata. This Court should not take jurisdiction to review the state court judgment under these circumstances, either by appeal or by writ of certiorari.

III

Jurisdiction Will Not Lie By Appeal Or Writ Of Certiorari Because A Substantial Federal Question Has Not Been Presented

Appellant insists that this case conflicts with federal law regarding regulatory takings, thus mandating this Court's review. Appellant also claims that the Court should adopt uniform standards to determine when an unconstitutional taking has occurred, and that the Court is squarely presented with these issues in this case. Contrary to these assertions, such issues are not presented by this case.

The Court of Appeal followed this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) in finding no unconstitutional taking. The issues presented herein are not different from those in *Agins*, and do not present any additional issues which the Court has not already decided.

This case does not present the issue of a property owner being denied the entire use of his land. Instead, appellant has alleged that the County, through its Board of Supervisors, denied a particular and intensive development plan submitted by appellant and that the City opposed the development plan. In its review, the Board found that appellant's particular development plan did not comport with the County's general plan.⁹ (See Appendix.)

The Court of Appeal followed *Agins* in holding that appellant's fourth amended complaint did not state facts sufficient to constitute a cause of action for an unconstitutional taking of private property. The lower court found that the appellant had applied for approval of a particular intensive residential development and that such application had been denied. The court held that the denial of this particular plan did not constitute a refusal to permit any use or development of the property.

As the lower court pointed out, appellant alleged that the property was in fact zoned for residential purposes in the County's general plan and zoning ordinances. The plan and ordinances do not preclude all development. However, the proposed development must comply with applicable laws. Appellant was not precluded from submitting a development plan which eliminated the deficiencies in the plan submitted and which was consistent with the general plan. Appellant however, chose not to submit an-

⁹A county is forbidden by law from approving a tentative subdivision map if it is inconsistent with the county's general plan. Cal. Gov't Code §§ 66473.5 (West Supp. 1985), 66474 (West 1983).

other plan.¹⁰ Instead, appellant filed suit claiming that a governmental entity has but two choices when a developer submits a tentative development plan, either approve the development as submitted or pay the developer damages. Under these facts the Court of Appeal held that an uncon-

¹⁰Appellant boldly asserts that available administrative remedies were futile, and claims that such futility is shown by the fact that there were subsequent refusals to entertain alternative applications. (AJS 16.) In making this claim, appellant infers that subsequent subdivision maps were filed in regard to the 44 acre parcel which appellant claims has been taken without just compensation. Contrary to this misleading suggestion, no subdivision maps were filed on the 44 acre parcel after the initial tentative subdivision map was denied.

The map and zone change request referred to by appellant as evidence of "alternative applications" was for a 108 acre parcel owned by appellant, and unrelated to the 44 acre parcel which appellant claims was taken without just compensation. (AJS 8 n.9.) It should first be noted in regards to the application on the 108 acre parcel that such application was submitted prior to the denial of the tentative subdivision map on the 44 acre parcel, not subsequent thereto. The applications were not processed because the County Planning Director determined that the map applications and requested re-zoning were not consistent with the County's Davis Area General Plan land use designation for the 108 acre parcel. Thus, if the appellant desired to pursue the applications for the 108 acre parcel it would first have to obtain a general plan revision which would be consistent with the desired re-zoning. Cal. Gov't Code §§ 65860 (West 1980), 65358 (West Supp. 1985). This appellant declined to do. Although appellant's "subsequent application" was in truth for an unrelated parcel of property, and not for the 44 acre parcel, this incident also demonstrates appellant's pattern of refusing to pursue available administrative remedies.

Appellant also claims that the City's refusal to approve a housing proposal on appellant's 15 acre "connecting property" demonstrates futility. (AJS 8-9.) The record, however, demonstrates that appellant refused to modify its project design so as to conform to the City's general plan. This is another incident illustrating appellant's steadfast refusal to modify a development proposal which was inconsistent with adopted land use plans.

stitutional taking had not been stated. In this respect, the facts of our case are not unlike *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136-37 (1978) where the Court declined to find that the application of New York City's landmark preservation law to Grand Central Terminal effected a taking because, although the Landmarks Preservation Commission had disapproved a plan for a fifty story office building above the terminal, the property owners had not sought approval for another plan, and it therefore was not clear whether the Commission would deny approval for all uses of the property.

Another reason given by appellant to review this case is the adoption of uniform standards in determining when an unconstitutional taking occurs. This court, however, has already stated that no precise rule determines when a property has been taken, that the question requires a weighing of private and public interests. *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980). The lower court in finding that no taking had occurred, merely followed this Court's decision in *Agins*. There is no inconsistency in the lower court's decision with *Agins* as the court merely applied that decision to the facts as presented in this case. Review should not be granted as this Court has already addressed these issues in *Agins*; there is no new issue presented by this case which the Court is required to address.

Another issue which appellant claims is presented by this case is the issue of remedies available for a claimed unconstitutional taking. May a property owner be restricted to mandamus or declaratory relief, or must the owner be awarded damages for the claimed unconstitutional taking? While the lower court did state that current California law restricts a plaintiff's remedy to mandamus or declaratory relief in a case where an unconstitutional

taking is alleged, the court need not have reached this issue because it held that a cause of action had not been stated. The issue sought to be reached by appellant is not clearly presented by this case because it is only one basis cited by the Court of Appeal for its decision. Review should not be granted for the purpose of addressing this ancillary issue.

Not only does the lower court decision follow this Court's decision in *Agins*, it does not conflict with other federal cases. The decision only governs the parties in this case. The lower court's ruling was an unpublished decision which is not stare decisis under California law.¹¹ Therefore, this decision does not negate or supplement existing law.

Another reason why review should not be granted is the failure of the record to support exhaustion of administrative remedies. This Court recently held in another case alleging an unconstitutional taking of property without just compensation that the case was not ripe for review, holding that the respondent had failed to seek variances to develop the property. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 53 U.S.L.W. 4969 (June 28, 1985). The trial court in our case specifically held that the appellant had failed to exhaust its administrative remedies.¹² (CA, AJS

¹¹An unpublished opinion cannot be cited or relied upon by a court or a party. Cal. Rules of Court 977(a).

¹²Although appellant alleges in its complaint that it exhausted its administrative remedies, conclusionary allegations of law or fact are not deemed true by the reviewing court under California law. *Pan Pacific Properties, Inc. v. County of Santa Cruz*, 81 Cal.App.3d 244, 251 (1978).

A-5.) The record before this Court does not show that the appellant has pursued all administrative avenues open to it, or that the appellees have reached a final decision regarding development of the property. As in *Williamson County Regional Planning Commission*, this Court should not grant review as the record in this case does not indicate that these issues have been resolved.

CONCLUSION

Appellant's appeal must be dismissed because this Court lacks jurisdiction under § 1257(2). The lower state court did not uphold a state statute against a constitutional attack. Even if appellant's papers were to be treated as a writ of certiorari, jurisdiction is lacking inasmuch as the judgment might have rested upon a non federal ground, the trial court having expressly sustained demurrers to the complaint based upon failure to exhaust administrative remedies and res judicata.

Additional policy reasons exist why review should not be granted either by appeal or writ of certiorari in this case. This case does not present new issues for decision. The Court of Appeal expressly followed this Court's guidelines in *Agins v. City of Tiburon* in determining that no cause of action had been stated. There is no conflict with the decisions of this Court. In addition, as an unpublished decision, the lower court's decision does not make new law. Nor does the record in this case indicate that appellant utilized all administrative avenues open to it, or that ap-

pellees have taken a final position regarding any development of the property. Review should be denied.

Respectfully submitted,

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APPENDIX

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BEFORE THE BOARD OF SUPERVISORS OF THE
COUNTY OF YOLO, STATE OF CALIFORNIA

In the Matter of the Appeal of

MacDONALD, SOMMER & FRATES

from Planning Commission Denial
of Tentative Parcel Map No. 2462

NOTICE OF DETERMINATION
AND FINDINGS, DECISIONS
AND ORDER ON APPEAL

(Filed June 14, 1977)

The appeal of the Yolo County Planning Commission's denial of Tentative Parcel Map No. 2462 came regularly before this Board for hearing on Tuesday, February 10th, 1976. Also before this Board on said date was the final environmental impact report submitted on said Subdivision No. 2462.

The following individuals were present at said hearings:

1. Developers-Appellants Arch MacDonald, Ralph S. Sommer and Frank V. Frates, represented by their attorneys, Edward R. MacDonald and Dougal MacDonald.
2. Robert Peterson, Yolo County Planning Director, and Richard King, Assistant Yolo County Planning Direc-

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tor, represented by their attorney, C. Lee Humes, Deputy County Counsel.

3. Gloria McGregor, Director of the Davis Community Development Department.

4. Stan Young, representative of the El Macero Community Services District Advisory Committee.

5. All members of the Board of Supervisors were present throughout said hearing, and were advised by Charles R. Mack, County Counsel.

During said hearing, the Board of Supervisors received written and documentary evidence, exhibits, and heard oral arguments. The cause was submitted to this Board for decision, and this Board hereby makes the following Findings of Fact, Decision and Orders:

FINDINGS OF FACT

I. *Environmental Impact Report*

A. The final Environmental Impact Report on proposed Subdivision No. 2462 was submitted to this Board. The Board finds and certifies that said final EIR has been prepared by the Yolo County Planning Department in accord with the California Environmental Quality Act, Guidelines adopted pursuant thereto, and the Yolo County Code and that it has reviewed and considered the information contained therein.

B. The Board finds that the proposed project has a significant effect on the environment.

C. The Board finds that the proposed project has the following significant adverse impacts upon the environment:

1) The summary of impacts and their disposition delineated in said final environmental impact report at

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pages 38-40 are hereby found by this Board to be an accurate and proper appraisal of the significant adverse environmental impacts of the proposed project. Said summary is incorporated herein by this reference as though set forth here in full.

II. *Appeal of Denial of Tentative Map*

A. This Board hereby finds that the proposed Subdivision, together with the provisions for its design and improvement shown in Tentative Subdivision Map No. 2462 are not consistent with the General Plan of the County of Yolo, nor with the specific plan of the County of Yolo embodied in the Zoning Regulations of the County, for the following reasons, which are hereby adopted as Findings by this Board:

1) The Yolo County General Plan requires and states as an object of the Plan that development in the County shall be sound and orderly, and shall occur based on an economic base related to human resources, soil, water, drainage, topography and potentials for services such as sewerage and transportation. The General Plan requires that the spread of development shall be controlled to provide for efficient services to developments by community facilities and utilities, and to prevent the piecemeal development of subdivisions within agricultural zones which results in the impossibility of economically farming the remaining parcels.

2) The Zoning Ordinance of the County of Yolo is a specific plan within the meaning of Article 8 of Chapter 3 of Division 1 of the Government Code, commencing with § 65450, and is declared to be so by Yolo County Code

§ 8-2.102. Said specific plan also requires sound and orderly development as aforesaid, by virtue of § 8-2.104. The Yolo County Land Development Ordinance in § 8-1.102 states its purpose to be the effectuating of the objectives established for development in the County by the General Plan, and requires that adequate provision for ingress and egress be made in every subdivision approved pursuant to said Ordinance.

3) The closest developed property westerly of the proposed subdivision is approximately one-quarter of a mile to the west of the closest proposed boundary on the subject subdivision. The intervening 56 acres presently is under cultivation. The proposed subdivision would render cultivation of the intervening 56 acres economically unfeasible because said cultivation would result in dust, pesticides, and crop dusting operations becoming a nuisance to the residents of the proposed subdivision.

4) The site of the proposed subdivision is located within an area of prime agricultural land. The character of the soil on the site has been impaired by its sale to the State of California under threat of condemnation.

5) The only access to the proposed subdivision presented in said Tentative Map is by way of the proposed extension of Cowell Boulevard from its present terminus to the western-most boundary of the proposed subdivision. This land currently is within the city limits of the City of Davis, and is owned by the appellants.

6) The City of Davis reported to this Board that it would refuse to accept dedication of the proposed extension of Cowell Boulevard, and would refuse to enter into an agreement with either Yolo County or any existing or

proposed special district to allow maintenance by said district of Cowell Boulevard within the Davis City limits. The City of Davis further reported to this Board that it would resist the development of the proposed extension of Cowell Boulevard as a private street. This evidence was unrefuted in the hearing. Therefore, this Board finds that the subdivision and its design and improvements as proposed do not provide for access to the subdivision by a public street. Until such public street is constructed and accepted by a governmental entity capable of maintaining it, the Board finds that the subdivision would be served only by a private road, with no means for maintenance by a public entity of said road.

7) Yolo County Code § 8-1.702(b) requires each parcel in a subdivision to be served by a public street. The Board finds that the Map as submitted does not provide for service to each parcel by a public street, because the proposed map does not provide for the dedication to and acceptance by any governmental entity of the only access route which consists of the proposed extension of Cowell Boulevard.

8) Yolo County Code § 8-1.102(d) requires that each subdivision make provision for adequate means of ingress and egress to the subdivision. The Board finds that the proposed private development of Cowell Boulevard as a private road does not provide adequate means of egress and access to the proposed subdivision.

9) The Board finds that the Tentative Map as presented does not provide for sewer service by any governmental entity. The proposed sewer service will be provided by the El Macero Interceptor Sewer Line, which is

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located on the easternmost boundary of the proposed subdivision. Yolo County Agreement No. 75-97 requires that before any new connection to the said El Macero sewer line may be approved by the County, the area served by the connection must either be in the existing El Macero County Service Area, within the City of Davis, or must annex to the El Macero County Service Area. The proposed development is not within the City of Davis and is not within the existing El Macero County Service Area.

10) The City of Davis has officially opposed the subdivision because it is inconsistent with the General Plan.

11) The only means for provision of sewer services by the El Macero interceptor sewer requires that the proposed subdivision annex to the existing Community Services Area. Said annexation is subject to Local Agency Formation Commission jurisdiction. The Board finds that no proceedings currently are pending before LAFCO for the annexation of the proposed subdivision. If the proposed subdivision is annexed to the El Macero County Service Area, sewer service will be provided by the El Macero interceptor sewer upon the payment of the fees required by Contract No. 75-97, if any.

12) The Board finds that the general policy within the Yolo General Plan of sound and orderly development requires that governmental services required by a subdivision located contiguous to a city should be provided by that city rather than by a special district or combination of special districts, and takes official notice of the fact that the Yolo County Local Agency Formation Commission has adopted this policy.

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13) The proposed subdivision would require the level of police protection required by any residential subdivision. The Yolo County Sheriff's Department has jurisdiction on the proposed site. The level of protection capable of being afforded to the proposed site by the Sheriff's Department is not intense enough to meet the needs of the proposed subdivision.

14) There is no provision made in the proposed subdivision for the provision of water or maintenance of a water system for the subdivision by any governmental entity. The only provision for water service proposed in the map is by a private water company. The Board finds that wells located on or near the proposed site have sufficient capacity to provide said water.

15) The proposed map makes no provision for the maintenance, lighting, and cleaning of the streets within the subdivision to be dedicated to the public, nor of Cowell Boulevard. Maintenance, lighting, and cleaning of said streets could only be provided by an existing special district or a new special district. The multiplication of special districts in the area of the proposed subdivision violates the Yolo County General Plan's mandate of sound and orderly growth.

16) The proposed subdivision makes no provision for parks or recreation facilities.

17) Provision and maintenance of parks and recreation facilities within the proposed subdivision could be accomplished only by a special district. The proposed subdivision is not located within a special district capable of providing said services.

18) The residents of the proposed subdivision will avail themselves of the park and recreation facilities located in the City of Davis, but will pay no taxes or use charges to offset the cost of maintenance of the park and recreation facilities located in the City of Davis.

B. The Board finds that the proposed site is not physically suitable for the type of development for the following reasons which are hereby adopted as findings:

1. The Board finds that the site proposed for the subject tentative map is not presently served either by the City or by the El Macero County Service Area or any other special district with the governmental services required for the provision or maintenance of essential services on the site. No provision is made within the Tentative Map for the provision of sewer, water & street maintenance, street lighting, parks, recreation, and police services by any public entity.

C. The Board finds that the design of the proposed subdivision and the type of improvement is likely to cause serious public health problems, for the following reasons, which are hereby adopted as findings:

1. Access to the subdivision is by means of the proposed extension of Cowell Boulevard for a distance of 1300 feet, more or less. The map presented makes no provision for any other means of access to the subdivision. The Board finds that the construction of a subdivision only with one 1300-foot long access route constitutes a real and substantial danger to the public health in the event of fire, earthquake, flood, or other natural disaster, and could render said subdivision inaccessible in said event.

D. The Board finds that the proposed subdivision violates the Yolo County Land Development Ordinance for the following reasons, which are hereby adopted as findings:

1. The proposed subdivision violates the orderly growth concept in the Yolo County General Plan.

2. The Yolo County Land Development Ordinance requires effectuation of the Yolo County General Plan by every development authorized pursuant to the Ordinance. The Ordinance requires that adequate means of egress and ingress be provided for every subdivision, and that every parcel within the subdivision be served by a public street.

3. The Board finds that these requirements are not met because no provision for access by a public street is made by the Tentative Map as submitted.

E. The Board finds that there has been no showing of the community needs for the proposed subdivision for the following reasons which are hereby adopted as findings:

1. Yolo County Code § 8-1.804 requires the affirmative showing of satisfaction of community needs for the proposed subdivision.

2. Because the proposed subdivision provides no means for provision of the governmental services essential for a residential subdivision, the community needs would not be served by this proposed subdivision.

3. The residents of this proposed subdivision would of necessity look to the City of Davis and the El

Macero County Service Area for provision of transportation, recreation and park facilities. The residents of the City of Davis and the El Macero County Service Area consequently would be taxes (sic) for provision and maintenance of the services to the residents of the subdivision, located outside the limits of those entities.

F. The Board finds that no representations or promises were made to the Appellant by any County officer, agent or employee that a subdivision would be approved on the subject site, for the following reasons, which are hereby adopted as Findings:

1. Appellant alleged that the developers were told by an employee of the City of Davis that they would be able to develop the subject site as a subdivision upon completion of the El Macero interceptor line.

2. The Board finds that no officer, agent or employee of Yolo County represented to the Appellants or any other person that the County would approve a subdivision on the existing area.

3. The Board finds that the owners of the subject parcel are entitled to sewer service by the El Macero interceptor sewer for any legal use on the subject site, upon the annexation of the site to either the City of Davis or the El Macero County Service Area, and upon the reimbursement of necessary facilities expansion costs, if any, pursuant to Yolo County Contract No. 75-97.

4. The Board finds that this entitlement to sewer service does not constitute an entitlement to construct a subdivision in violation of the Subdivision Map Act or the Yolo County Code, or inconsistent with the general or specific plans for the area. The Board further finds that

no representations were made by any officer, agent, or employee of the County that the entitlement to sewer service would result in an entitlement to a subdivision on the subject site.

CONCLUSIONS AND DECISIONS

1. The proposed subdivision, together with the provisions for design and improvement, is inconsistent with the General Plan of the County of Yolo.

2. The proposed subdivision, together with the provisions for its design and improvement, is inconsistent with the specific plan of the County of Yolo set forth in the Zoning Regulations.

3. The site of the proposed subdivision is not physically suitable for the type of development.

4. The design of the subdivision and the type of improvement proposed are likely to cause serious public health problems.

5. The proposed subdivision violates the Land Development Ordinance of the County of Yolo.

6. There has been no showing of community needs for the proposed subdivision, as required by the Land Development Ordinance of the County.

7. The County is not estopped to apply the Subdivision Map Act, the Land Development Ordinance, the General Plan, or the specific plans for the area to the instant case.

App. 12

ORDER

The Board of Supervisors of the County of Yolo, for the above stated reasons, and based upon the findings delineated hereinabove, hereby makes the following orders:

1. The final Environmental Impact Report submitted on the proposed subdivision hereby is adopted, and the Clerk of the Board is directed to file a Notice of Determination that the environmental impact report has been adopted pursuant to the California Environmental Quality Act, and shows the development will result in substantial adverse effect to the environment.

2. The findings of the Yolo County Planning Commission, its decision and its orders denying Tentative Parcel Map No. 2462 hereby are sustained and adopted.

4. The appeal on the decision of the Yolo County Planning Commission on Tentative Map No. 2462 hereby is dismissed.

PASSED AND ADOPTED by the Board of Supervisors this — day of —, 1977, by the following vote:

AYES:

NOES:

ABSENT:

/s/ TWYLA J. THOMPSON
Chairman of the Board of Supervisors
County of Yolo, State of California

ATTEST:

LAURENCE P. HENIGAN, CLERK

By /s/ PETE E. LUCAS

DEPUTY
(SEAL)

REPLY BRIEF

Supreme Court, U.S.

FILED

SEP 10 1985

JOSEPH F. SPANIOL, JR.
CLERK

No. 84-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal From The Supreme Court Of California

**BRIEF OPPOSING
MOTION TO DISMISS APPEAL**

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Attorneys for Appellant

September 9, 1985

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IN THE

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OCTOBER TERM, 1984

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Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal From The Supreme Court Of California

**BRIEF OPPOSING
MOTION TO DISMISS APPEAL**

SUMMARY OF ARGUMENT

Relying on this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 53 U.S.L.W. 4969 (June 28, 1985) (hereinafter "*Williamson*"), Appellees move to dismiss this appeal, contending that it is not ripe. Appellees misread *Williamson*, confusing the concept of ripeness with the requirement that administrative remedies be exhausted—and they misstate the effect of the restriction Appellees have imposed on Appellant's land.

NOTE: All terms used herein and defined in the Jurisdictional Statement shall have the meanings therein given. In quoted material, all emphasis is ours except where otherwise noted.

Appellees' motion should be denied and the appeal heard by this Court for the following reasons:

(a) The case is "ripe for decision" because *all* California proceedings necessary to restrict the Property to agricultural use have been concluded. Restriction of the Property to agricultural use deprives Appellant of all economic beneficial use of it.

(b) Exhaustion of remedies is not required as a precondition to an action brought under 42 USC § 1983; but in any case, Appellant has no *administrative remedy* available to it which it has not already exhausted. It sought permission to utilize the Property for residential purposes, relying upon what it thought to be the controlling general plan and zoning ordinance allowing such use. In administrative proceedings *which are now final*, Appellees applied agricultural restrictions to the Property. With a restriction to agricultural use in place, Appellant cannot obtain relief by variance *because California law precludes change of use by variance*.

Appellees argue that the case should be dismissed for Appellants' failure to seek a legislative remedy, i.e., an amendment of the general plan and zoning ordinance. But the law imposes no duty *to exhaust legislative remedies* before seeking judicial redress of constitutional wrong. Since the theoretical possibility of legislative remedy can never be exhausted, such a requirement would preclude access to the courts and effectively deny all right to recover compensation.

(c) The restrictions Appellees have imposed upon the Property are clear and final. They relegate the Property to agricultural use and deprive Appellants of all economic beneficial enjoyment.

This case presents this Court with an ideal opportunity to address the issues it could not reach in *Williamson*.

ARGUMENT

I

COUNTY'S DENIAL OF APPELLANT'S SUBDIVISION APPLICATION IS A FINAL DECISION RESTRICTING THE PROPERTY TO AGRICULTURAL USE

We restate the key facts briefly in order to bring the issues back into focus.¹

1. Summary Of Proceedings Restricting Property To Agricultural Use.

The Property is located within the jurisdiction of Appellee, County of Yolo ("County") adjacent to the boundaries of Appellee, City of Davis ("City"). County's general plan and ordinance provisions purport to allow residential use of the Property. (CT ¶ 8). In 1974, City designated the Property "Agricultural Reserve" on its general plan.² (CT ¶ 21).

Relying on County's apparent willingness to allow residential use—and despite City's declaration that the Property should be restricted to agricultural use—Appellant applied to the County Planning Commission (the "Planning Commission") on April 5, 1975 for approval to subdivide the property into 159 residential lots.³ (CT ¶ 20). The subdivision plan was reasonable and complied in all respects with the then applicable County general plan and subdivision ordinance. (CT ¶ 20). The Planning Commission denied Appellant's application.

¹ The record in this case is short and simple. Since Appellant's Complaint was dismissed for failure to state a cause of action, the facts stated in the Complaint must be taken as true for purposes of these proceedings. See authorities cited at Jur. Statement 4 fn. 2.

² California law authorizes cities to adopt a general plan for "any land outside its boundaries which . . . bears relation to its planning", Cal. Gov't. Code § 65300 (Deering Supp. 1985), and to adopt zoning ordinances for such land, Cal. Gov't. Code § 65859 (Deering Supp. 1985).

³ Subdivision of land in California is closely regulated by state statute, the California Subdivision Map Act, Cal. Gov't. Code §§ 66410 *et seq.* (Deering 1979), and local ordinances promulgated under it.

Appellant appealed the denial to the legislative body of County, the County Board of Supervisors (the "Board"). The Board is the "appeal board", the body to which such appeals must be addressed. See Cal. Gov't Code § 66452.5 (Deering Supp. 1985). The Board rejected Appellant's appeal on June 14, 1977, basing its decision on a finding that the Property could only be used for agricultural purposes. (CT ¶¶ 23, 24 and 25).

Representatives of City appeared before the Planning Commission and Board, urging restriction of the Property to agricultural use in order to conform to the restrictions in City's general plan. (CT ¶ 21). City declared that it would not allow extension of City streets (CT ¶ 21) and services for residential use of the Property (CT ¶¶ 17 and 19), notwithstanding the presence of such streets and services in convenient locations and the subdivider's willingness to pay for their extension and installation.⁴ (CT ¶¶ 6, 7 and 8). The County's decision adopted City's position over the objections of Appellant,⁵ relying on denial of access and services as a key reason for refusing to allow residential use. (CT ¶¶ 21, 23, 24 and 25).

Neither the Planning Commission nor the Board proposed or requested "further study" of alternatives to Appellant's subdivision plan. They rejected all use not consistent with City's Agricultural Reserve designation because of City's denial of essential services.

⁴ All streets and services necessary to sustain residential use of the property directly abutted either the Property or contiguous property owned by Appellant. (CT ¶ 9). No limitation of capacity or other physical or governmental impediment rendered the access or services unavailable, other than City's determination to restrict the property to agricultural use. (CT ¶¶ 6, 7, 8 and 12). Under the Subdivision Map Act, a subdivider can be required to install all "off-site" improvements (streets, storm drains, services, etc.) and dedicate all required easements at the subdivider's expense. See, e.g., Cal. Gov't Code §§ 66419, 66473, 66462 (Deering Supp. 1985); *Associated Home Builders Of The Greater Eastbay, Inc. v. Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630 (1971).

⁵ The California Subdivision Map Act grants local governing bodies broad discretion to reject subdivision applications even though they comply with that jurisdiction's own general plan and zoning ordinances. See, e.g., Cal. Gov't Code §§ 66473; 66474(c), (d), (e), (f) and (g) (Deering Supp. 1985).

2. The Board's Decision Restricting The Property To Agricultural Use Is Final.

Under California law, the governing body of the local agency (in this case, the Board) is the final arbiter of the subdivision proceeding; and without approval of a subdivision map, the Property cannot be used for residential purposes. See Cal. Gov't Code §§ 66424, 66426, 66499.30 (Deering Supp. 1985). The Board denied Appellant's proposal and made clear findings to explain its reasons. Appellant's appeal to the Board exhausted its administrative remedy. See *Topanga Assn. For A Scenic Community v. County Of Los Angeles*, 11 Cal.3d 506, 522 P.2d 12, 113 Cal.Rptr. 836 (1974).

3. Even If The Exhaustion Doctrine Applied, Appellant Has No Administrative Remedy Which It Has Not Exhausted.

As *Williamson* states (53 U.S.L.W. at 4979), exhaustion of administrative remedies is not required as a pre-condition to making a claim under 42 U.S.C. § 1983. Nonetheless, Appellees suggest that Appellant's case should be dismissed because it failed to apply for a variance—or approval of a different sort of plan. California law does not require such application where it would conflict with a use designation which a local governing body has clearly stated it intends to enforce. *Furey v. City of Sacramento*, 24 Cal.3d 862, 871, 598 P.2d 844, 849, 157 Cal. Rptr. 684, 689 (1979).

Moreover, a variance purporting to allow a change of use would be unlawful in California. Government Code § 65906 (Deering 1979).⁶ The variance procedure is intended to relieve specific property of unique hardship due to the application of certain restrictions within a use classification. County did not deny Appellant's application for residential use because of problems with parcel size, street configuration or other difficulties with the proposed design or improvement of the subdivision. It denied the application because it proposed *residential*—as opposed to *agricultural*—use of the Property. (CT ¶¶ 23, 24 and 25).

⁶ See, also, *Topanga Assn. for A Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d 506, 511 fn. 5, 519 fn. 18.

Appellees contend that this appeal should be dismissed because City might not object to, and County might therefore approve, some sort of unspecified and undefined project on the Property which somebody might someday conceive to allow Appellant an economic use. That is a disingenuous variation on an argument rejected by Mr. Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655, fn.22 (1981). Acceptance of that argument would be tantamount to a denial of all right to relief in any case.

4. Appellant Is Not Required To Exhaust Legislative Remedies: It Is Not Required To Seek General Plan Or Zoning Ordinance Amendments As A Precondition To Judicial Relief.

Appellees suggest that Appellant should seek to amend City's general plan to delete or modify the Agricultural Reserve designation. (AMDA 11, fn. 10) But under California law, the General Plan is legislative; and so are amendments of it. Cal. Gov't. Code § 65358(a) (Deering Supp. 1985). The law imposes no obligation to exhaust legislative remedies. See, *Ogo Assoc. v. City of Torrance*, 37 Cal.App. 3d 830, 834, 112 Cal. Rptr. 761, 763 (1974); and *Furey v. City of Sacramento*, supra, 24 Cal.3d at 871, 598 P.2d at 849, 157 Cal.Rptr. at 689.

II

THIS CASE IS DISTINGUISHABLE FROM WILLIAMSON

In *Williamson*, this Court held that plaintiff landowner's action in inverse condemnation was not ripe because plaintiff "had not yet obtained a *final decision* regarding the application of the zoning ordinance and subdivision regulation to its property" 53 U.S.L.W. at 4973. The plaintiff's proposed development plan did not comply with the applicable zoning ordinance—and it was denied on that ground. The plaintiff did not "seek variances that would have allowed it to develop the property according to its proposed plat. . . ." 53 U.S.L.W. at 4973.

Here, Appellant's proposed development plan conformed in all respects with the zoning ordinances applicable to the Property. (CT ¶¶ 8 and 9). County did not deny the application because the proposed residential plan was too dense or did not conform with residential design or improvement requirements. County denied Appellant's application *because the proposed use was wrong, i.e., residential as opposed to agricultural*. (CT ¶¶ 23, 24 and 25).

There is *no agricultural use* from which Appellant can derive any economic return. (CT ¶ 11). No agricultural use of the property will return enough to cover the cost of farming and the fixed cost of holding the property. Restriction to agricultural use thus condemns Appellant to hold the property *at a loss*.⁷ (CT ¶ 11).

Appellant and Appellees are not here arguing over the level of return which constitutes a "reasonable" or "fair" return. The restrictions imposed by Appellees relegate Appellant to a zero "return." (CT ¶ 11).

In *Williamson*, this Court stated that an inverse condemnation claim is not ripe until a court can accurately measure the extent to which the challenged action interferes with reasonable investment backed expectations. 53 U.S.L.W. at 4974. Since the regulatory agencies in *Williamson* had not completed their action, the degree of deprivation could not be ascertained. That difficulty does not exist in this case.

III

APPELLANT'S PETITION FOR ADMINISTRATIVE MANDATE PENDING IN STATE COURT DOES NOT REQUIRE DISMISSAL OF THIS APPEAL BECAUSE THE PETITION IS PURELY REMEDIAL AND IS MOOT IN ANY CASE

Appellees note that Appellant filed a petition for writ of mandate in the California Superior Court to challenge County's action denying Appellant's project. No hearing has ever been held on the mandate petition.

⁷ Appellant's carrying costs for purposes of calculating its loss do not include land acquisition payments or debt service on financing.

In *Williamson*, this Court points out that "... there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." 53 U.S.L.W. at 4974.⁸ Accordingly, Appellant's writ of mandate action in the California state courts has no bearing on the ripeness of this matter.

CONCLUSION

Appellees' motion should be denied. This Court should note probable jurisdiction of this appeal.

Respectfully submitted,

HOWARD N. ELLMAN
SCOTT C. VERGES
ELLMAN, BURKE & CASSIDY
EDWARD R. MACDONALD
MACDONALD & TERANISHI

By HOWARD N. ELLMAN
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Counsel for Appellant
*Counsel of Record

September 9, 1985

⁸ While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by County authorities, [cites deleted], respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. 53 U.S.L.W. at 4974-75.

JOINT APPENDIX

IN THE

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JOINT APPENDIX

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Appeal Docketed June 28, 1985
Probable Jurisdiction Noted October 21, 1985

BEST AVAILABLE COPY

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

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(a) Items marked “*” are not significant or relevant to the issues being briefed, and

(b) Items marked “***” are not a part of the record upon which the decision and result below is based in any particular. In many instances, Items marked “***” are from another case.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Items marked “*” and “***” denote docket entries designated by Appellees County of Yolo and City of Davis to which Appellant objects on the grounds that:

(a) docket entries marked “*” are not significant or relevant to the issues being briefed, and

(b) docket entries marked “***” are not a part of the record upon which the decision and result below is based in any particular. In many instances, the docket entries marked “***” are from another case (Petition for Writ of Mandate Action No. 36657).

June 14, 1977—Yolo County Board of Supervisors adopted the Final Notice of Determination and Findings, Decisions and Order on Appeal of Tentative Subdivision Map No. 2462.

October 13, 1977—Complaint for Declaratory Relief, Damages in Inverse Condemnation and Recovery of Taxes and Assessments Collected Through Fraudulent Misrepresentation, filed in the Superior Court of the State of California, County of Yolo.

** October 14, 1977—Petition in Action No. 36657 for Writs of Administrative Mandamus Pursuant to Code of Civil Procedure § 1094.5 filed in the Superior Court of the State of California, County of Yolo.

* December 22, 1977—Motion of Plaintiff to Consolidate this case and Action No. 36657 for Trial.

* January and 9, 1978—Opposition to Plaintiff's Motion to Consolidate this case and Action No. 36657.

* January 12, 1978—Demurrer of City of Davis to Complaint.

* January 23, 1978—Demurrer of County of Yolo to Complaint.

** January 23, 1978—Demurrer of County of Yolo to Petition for Writ of Mandate and Motion to Strike (Action No. 36657).

* February 1, 1978—Plaintiff's Opposition to Demurrers.

* February 24, 1978—Order of the Superior Court Denying Motion to Consolidate this case and Action No. 36657.

* March 30, 1978—Order of the Superior Court Sustaining Demurrers and Granting Leave to Amend.

* May 1, 1978—First Amended Complaint for Declaratory Relief, Damages in Inverse Condemnation and Recovery of Taxes and Assessments.

** June 23, 1978—Order of the Superior Court Sustaining Demurrers to Petition for Writ of Mandate with Leave to Amend and Order Denying Motion to Strike (Action No. 36657).

* July 10, 1978—Demurrer of City of Davis to First Amended Complaint.

* July 12, 1978—Second Amended Complaint for Declaratory Relief, Damages in Inverse Condemnation and Recovery of Taxes and Assessments.

*** July 14, 1978—Letter Agreement of Counsel (this case and Action No. 36657).

** March 9, 1981—Amended Petition in Action No. 36657 for Writ of Mandate (Code of Civil Procedure § 1094.5).

* March 19, 1981—Third Amended Complaint for Declaratory Relief, Damages in Inverse Condemnation and Recovery of Taxes and Assessments.

* April 17, 1981—Demurrer of City of Davis to Third Amended Complaint.

* April 17, 1981—Request of City of Davis for Taking Judicial Notice.

* June 24, 1981—Request of County of Yolo for Judicial Notice.

* June 24, 1981—Demurrer of County of Yolo to Third Amended Complaint.

* October 16, 1981—Motion of Plaintiff for Leave to File Amended Complaint.

* October 27, 1981—Order Allowing Plaintiff's Amendment of Complaint.

October 27, 1981—Fourth Amended Complaint for Declaratory Relief, Damages in Inverse Condemnation, Recovery of Taxes and Assessments, and Violation of Civil Rights Act of 1871.

December 3, 1981—Demurrer of City of Davis to Fourth Amended Complaint.

January 25, 1982—Demurrer of County of Yolo to Fourth Amended Complaint.

March 10, 1982—Response of Plaintiff in Partial Opposition to City of Davis' Request for Taking Judicial Notice.

* March 10, 1982—Plaintiff's Opposition to Defendants' Demurrer to Fourth Amended Complaint.

May 14, 1982—Plaintiff's Notice of Request and Request for Taking Judicial Notice.

* May 19, 1982—Opposition to Plaintiff's Request for Taking Judicial Notice.

* June 4, 1982—Plaintiff's Request for Partial Withdrawal of Plaintiff's Request for Judicial Notice.

July 21, 1982—Rulings of the Superior Court Sustaining Demurrers to Fourth Amended Complaint Without Leave to Amend.

August 19, 1982—Clerk's Notice of Entry of Judgment and Judgment of Dismissal.

October 15, 1982—Plaintiff's Notice of Appeal to the Court of Appeal of the State of California, Third Appellate District.

* July 6, 1984—Defendants' Request for Judicial Notice on Appeal filed in the Court of Appeal of the State of California, Third Appellate District.

December 5, 1984—Plaintiff's Request for Judicial Notice on Appeal filed in the Court of Appeal of the State of California, Third Appellate District.

January 24, 1985—Opinion and Judgment of the Court of Appeal of the State of California, Third Appellate District affirming rulings of the Superior Court sustaining Demurrers to the Fourth Amended Complaint Without Leave to Amend.

March 5, 1985—Plaintiff's Petition for Hearing before the Supreme Court of the State of California.

April 3, 1985—Order Denying Hearing by the Supreme Court of the State of California.



COUNTY OF YOLO
 PLANNING DEPARTMENT
 292 WEST BEAMER
 WOODLAND, CALIFORNIA 95695
 TELEPHONE 666-8556
 AREA CODE 916

May 14, 1975

Curtiss W. Gilley
 MacKay & Soms
 P.O. Box 390
 Davis, California 95616
 Dear Mr. Gilley:

Your office recently submitted Environmental Assessments and Tentative Maps for two parcels referred to as the MacDonald, Sommers, Frates property. Subdivision No. 2462 involves land within existing residential zoning. Subdivision No. 2463 involves land outside the Davis General Plan area and requires amendment to that plan and certain requested zone changes.

Action on the Tentative Map of Subdivision No. 2463 cannot be favorably considered before appropriate zoning is approved. Zoning must be consistent with the General Plan. The entire Davis Area General Plan, including subject property, is to be reviewed this summer and your request for amendment will be included in that review since the State only allows three General Plan hearings per year per jurisdiction.

The foregoing raises the question as to whether you would have us hold the package relating to land involved in Subdivision No. 2463, knowing a delay is necessary, or whether you would hold the information and the filing fee until after the General Plan hearings.

Please let me know immediately. We will meanwhile process the map and EIR on Subdivision #2462.

Very truly yours,

Richard P. King
 Assistant Director of
 Planning

RPK:vt

EXHIBIT A-1

COUNTY OF YOLO
PLANNING DEPARTMENT
292 WEST BEAVER
WOODLAND, CALIFORNIA 95695
TELEPHONE 644-8556
AREA CODE 916

April 19, 1977

Arch MacDonald, Ralph S. Sommer and Frank V. Frates
145 N. Second Street
Dixon, California

Gentlemen:

The Auditor's office has been requested to send to you a warrant covering the following fees:

Zone File #2447—zone change request.....	\$ 50.00
Tentative Subdivision Map #2463	250.00
Environmental Impact Report for above applications	200.00
	<u>\$500.00</u>

We are unable to process these applications because the requested zoning is not consistent with the Davis Area General Plan.

Also, we have in our files the copies of the Environmental Impact Report and the tentative subdivision maps. Please advise if you would like to pick up these reports and maps for your records.

Very truly yours,

Robert A. Peterson
Director of Planning

RAP:vt

enc: copy of letter of May 14, 1975
cc: Curtiss W. Gilley, MacKay & Soms

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO

MACDONALD, SOMMER & FRATES,
a partnership,

Plaintiff,

vs.

THE COUNTY OF YOLO, and
THE CITY OF DAVIS,

Defendants.

REQUESTS FOR
ADMISSION OF
FACTS
(SET NO. 1)

TO EACH PARTY AND TO THE ATTORNEY OF
RECORD FOR EACH PARTY IN THIS ACTION:

Defendant THE CITY OF DAVIS requests that plaintiff MacDonald, Sommer & Frates admit within twenty (20) days after service of this request for admission, Set No. 1, that each of the following facts is true:

1. The real property which is the subject of the above-entitled lawsuit (hereinafter referred to as the "subject property") is currently under commercial cultivation.
2. That the subject property is currently planted with corn.
3. That the subject property is currently the subject of a verbal agreement authorizing commercial agricultural use.
4. That Martin Bros. is a commercial farming company.
5. That during 1977 and 1978 Martin Bros. has conducted commercial farming operations on the subject property.
6. That pursuant to verbal agreement, Martin Bros. is required to make payment to or at the direction of MACDONALD, SOMMER & FRATES in return for Martin Bros.' agricultural use of the subject property.
7. That the payment by Martin Bros. for agricultural use of the subject property is computed as a prorata percentage of

Martin Bros.' receipts from sale of crops grown on the subject property and adjoining properties.

8. That prior to 1978 Martin Bros. made payments to or at the direction of MACDONALD, SOMMER & FRATES in consideration of Martin Bros.' agricultural use of the subject property.

9. That MACDONALD, SOMMER & FRATES expects payment from Martin Bros. in 1978 in consideration of Martin Bros.' current agricultural use of the subject property.

10. That the subject property has been used for commercial agricultural purposes each year from the year following acquisition of the property by MACDONALD, SOMMER & FRATES until the present time.

DATED: June 2, 1978.

WILLIAM L. OWEN
City Attorney of the City of Davis
Attorney for Defendant
 THE CITY OF DAVIS

**IN THE SUPERIOR COURT OF
 THE STATE OF CALIFORNIA
 COUNTY OF YOLO**

**RESPONSE TO REQUEST FOR
 ADMISSION OF FACTS.**

(Title Omitted in Printing)

**TO DEFENDANT, THE CITY OF DAVIS, AND TO ITS
 ATTORNEY OF RECORD:**

Plaintiff MacDonald, Sommer & Frates answers and objects to the Request For Admission Of Facts (Set No. 1) propounded by Defendant City of Davis as follows:

1. Objects to the request for admission of fact in paragraph 1 thereof on the grounds that the request is ambiguous and perhaps irrelevant. Specifically, the request is ambiguous for use of the term "commercial cultivation" without definition and without any attempt to equate the same with relevant terms such as "economic use," "beneficial use" or "substantial use."

In all the years of its ownership by Plaintiff, the land, which is the subject of the lawsuit, has not been under "commercial cultivation" in the sense that during all of said time, the total proceeds derived by Plaintiff from farming activity upon the Property have been less than the real property taxes and assessments payable with respect thereto for each and every year of such ownership. In other words, the farming income does not cover the most basic expense of property ownership. The deficit between the income, the balance of real estate taxes and assessments not covered by the income, and all other costs of land ownership has been paid yearly out of the pocket of Plaintiff. Stated yet another way, the land, devoted to agricultural uses, produces an inevitable and unavoidable yearly cash deficit on direct carrying costs and no return whatsoever upon invested capital. For agricultural purposes then, the Property has a negative value. Agricultural use, therefore, does not represent a substantial economic or beneficial use. To the extent that Defendant City of Davis uses the term "commercial cultivation" as a synonym for an economic or

beneficial agricultural use, the request for admissions is properly denied. To the extent that Defendant uses the term "commercial cultivation" in some other context, the request seeks irrelevant facts.

In the foregoing answer, Plaintiff states that gross income from farming fails to cover real estate taxes and assessments levied upon the subject property. In most years, gross income from farming provides only a minor fraction of the funds required to cover tax and assessment expense.

For example: (a) in 1974, farm income was \$9,685.00; net real estate tax and assessment expense (after a property tax refund of \$3,560.77) was \$25,779.93; (b) in 1975, farm income was \$7,558.30; real estate tax and assessment expense was \$25,792.61; (c) in 1976, farm income was \$6,608.71; real estate tax and assessment expense was \$21,842.45 (estimated); and (d) in 1977, farm income was \$18,368.32; real estate tax and assessment expense was \$28,857.00.

It is impossible to predict farm income, but Plaintiff is informed and believes that income for the years 1974-76 is more indicative of the likely income to be derived from the Property than the income earned in 1977. It is impossible to predict the impact of the Constitutional Amendment recently adopted under the name and style "Proposition 13" upon the obligation of existing assessments and the trend of property taxes. Prior to adoption of Proposition 13, Plaintiff had received notice of an assessment increase for the current tax year with respect to the subject property of approximately one hundred eighty percent (180%) over the preceding year. Based upon the data available to it, Plaintiff believes that the full application of Proposition 13 will not reduce property taxes and assessments to an amount which will be consistently covered by income from farming of the subject property. In short, adoption of a measure characterized as the most radical tax reform in the history of the United States since the adoption of the Thirteenth Amendment to the United States Constitution, fails to reduce taxes and assessments levied with respect to the subject property to a level sufficiently low to make the Property "economic" for agricultural uses.

For the reasons specified with particularity in the verified First Amended Complaint on file herein, the land is not under "commercial cultivation" for a separate and independent reason. First, soil is inferior to lands in the area because of the fact that the topsoil has been removed in connection with construction of Interstate 80. Second, residential development upon directly adjacent property prevents use of pesticide and herbicide application by means used in connection with commercial cultivation. Third, the property suffers from pest infestation and drainage conditions which cannot be cured and which render the land unsuitable for commercial cultivation since these conditions do not exist upon other land in the immediate vicinity suitable for competitive crops.

2. Objects to the request for admission of fact in paragraph 2 on the grounds of ambiguity. The use of the term "corn" is a generic term failing to identify with sufficient particularity the species of crop and whether it is intended for human or animal consumption. Plaintiff has no knowledge of the exact crop currently growing upon the Property.

3. Deny the request for admission of fact in paragraph 3 on the grounds stated in paragraph 1 above.

4. Object to the request for admission of fact in paragraph 4 on the grounds of ambiguity and for a failure to define the term "commercial" in context. Plaintiff is informed and believes that Martin Brothers, the firm identified in the request for admissions contained in paragraph 4, is in the business of growing agricultural products for sale on lands owned by others pursuant to lease or tenancy agreement. The fact that this activity may be commercial as to Martin Brothers has no relevance to whether or not it is commercial as to Plaintiff or as to the Property which is the subject of this action.

5. Deny the request for admission contained in paragraph 5 for the reason stated in paragraph 1 above. During the year 1977, income from farming on the subject Property equalled Eighteen Thousand Three Hundred Sixty-Eight and 32/100 Dollars (\$18,368.32) (more than double the income realized in any previous year) against real estate taxes of Eleven Thousand

Eight Hundred 06/100 Dollars (\$11,800.06), assessment bonds principal payments of Thirteen Thousand Six Hundred Seventy-Three and 76/100 Dollars (\$13,673.76) and interest payments on assessment bonds of Three Thousand Three Hundred Eighty-Three and 18/100 Dollars (\$3,383.18). Thus, gross income from farming was approximately Ten Thousand Dollars (\$10,000.00) less than the amount required merely to pay property taxes and assessments on the Property without regard to the other costs and expenses associated with ownership thereof.

6. Object to request for admission No. 6 on the grounds that it is ambiguous for failure to specify the verbal agreement to which it refers, for failure to specify the year to which the request is addressed, for failure to specify whether the proposed "requirement to make payment" is conditional or unconditional. Assuming that the request addresses the verbal agreement pursuant to which farming activities are being undertaken for the crop year 1978 and that the request seeks an admission that Martin Brothers has an unconditional obligation to make payment in exchange for such right, deny the request for admission.

7. Deny the request for admission contained in paragraph 7.

8. Object to the request for admission of fact in paragraph 8 on the grounds that the information requested is irrelevant. The fact that Martin Brothers or anyone else may have made payment for agricultural use of the subject property is irrelevant to any issue in this litigation. As set forth above, total payments derived from farming activity on the Property have generally represented a minor fraction of the direct out-of-pocket costs of carrying the Property since it has been known by Plaintiffs thus demonstrating that the Property has no substantial economic beneficial use for agricultural purposes.

9. Object to the request for admission of fact in paragraph 9 on the grounds that it is irrelevant. See answer to request for admission No. 8 and No. 1 above.

10. Object to the request for admission of fact in paragraph 10 on the grounds that it is ambiguous for the reasons

stated in paragraph 1 above. At no time during ownership of the Property by Plaintiff have farming operations yielded gross income equal to the direct out-of-pocket costs for taxes and assessments wholly without regard to the other costs of ownership. Only in the year 1977, has the income from farming operation equalled more than a minor fraction of the tax and assessment expense.

Dated: June 18, 1978.

MACDONALD, SOMMER & FRATES

By _____
Ralph Sommer

(Verification Omitted in Printing)

FILED
YOLO COUNTY
JUL 14 1978

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July 13, 1978

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C. Lee Humes, Esq.
Deputy County Counsel
Room 306—Courthouse
Woodland, CA 95695

Re: McDonald, Sommer & Frates v. County of Yolo and City
of Davis, Civil Nos. 36655 and 36657.

Gentlemen:

This letter is intended to summarize the discussions we have had over the last two days concerning temporary deferral of further proceedings in the captioned matters.

The Supreme Court of the State of California has granted a hearing in *Agin v. City Of Tiburon*, 80 Cal.App. 3d 225 (April 24, 1978). The request for petition by Tiburon was supported by the Attorney General who has also informed the Court of his intention to support a request for petition in *San Diego Gas & Electric Co. v. City of San Diego*, 80 Cal.App. 3d 1026 (May

17, 1978). These two cases are but a sampling of the half dozen or so inverse condemnation cases which have been reported in the advance sheets over the last six weeks. The flurry of activity and the apparent intention of the Supreme Court to give the issue a full airing suggests that the law applicable to the captioned cases is likely to receive the benefit of a Supreme Court opinion. The *Agin* and *San Diego* cases appear to raise squarely the principal issue in our cases. The Supreme Court's opinion should, therefore, provide important guidance in resolving our litigation.

For all of the foregoing reasons, it appears appropriate to defer any further proceedings in the captioned matters pending the Supreme Court's opinion in *Agin*. If we push ahead, we may try what ultimately may prove to be the wrong issues and end up with the burden of doing the job all over again. It is also possible that the Supreme Court opinion may provide a basis for disposition of the cases in their entirety.

Therefore, we have suggested together a program which would involve the following elements:

- (a) All pending motions would be taken off calendar.
- (b) No response would be required to pleadings not yet answered and no amended pleadings would be required to be filed in order to avoid default under outstanding court orders.
- (c) During the period of such suspension of activities, no interest would accrue on any judgment ultimately awarded whether for principal or costs in either action.
- (d) During the period of such suspension of activities, no other discovery would be undertaken, motions made or other action taken in the captioned cases, nor would any other judicial proceedings be initiated seeking adjudication of the matters referred to in the captioned litigation or arising from any of the factual allegations or legal contentions made therein.
- (e) The period of suspension would be for one (1) year, all parties reserving the right to terminate the period of suspension by sixty (60) days' prior written notice to the

other parties. The right of termination of the period of suspension is required in order to assure each party the ability to protect itself against the passage of time-limits which the parties might not be able to extend by stipulation. Any party terminating the one (1) year suspension will bear the burden of taking such actions and reinitiating such motions as may seem appropriate at the time. (In other words, if counsel for plaintiff gives the notice, it will be said counsel's burden to file an amended Petition in No. 36657 and renotice the transfer motions.)

In discussing the foregoing arrangement, we have recognized the possibility that the Supreme Court may not have resolved the *Agins* and *San Diego* cases within the one (1) year suspension period. At the end of that period of time, however, it is possible that we will have a much better idea concerning when we may expect the opinions and we may be able to plan accordingly.

By a copy of this letter, I am informing Judge Ackley of the discussions which have occurred between the parties and the reasons why all matters have been taken off calendar. If all of you agree that this letter accurately sets forth our understanding, please so indicate by executing the copy of this letter which I have enclosed and returning it to me. I will see to the circulation to all counsel of executed counterparts of this letter. If any of you have any questions, objections or additions to what I have set forth above, please let me know.

Very truly yours,

Howard N. Ellman

cc: The Honorable Harry A. Ackley
Edward R. MacDonald, Esq.

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO

MACDONALD, SOMMER & FRATES,
a Joint Venture,

Petitioner,

vs.

COUNTY OF YOLO, a political
subdivision of the State of
California; CITY OF DAVIS,
a municipal corporation,

Respondents.

No. (36657) 36655

AMENDED
PETITION FOR
WRIT OF
MANDATE
(Code of Civil
Procedure § 1094.5)

Petitioner MACDONALD, SOMMER & FRATES requests that this court issue its alternative and peremptory writs of administrative mandamus under Code of Civil Procedure § 1094.5 directed to respondents County of Yolo and City of Davis, and by this verified petition alleges:

A. PARTIES

1. Petitioner MACDONALD, SOMMER & FRATES is now and at all times relevant hereto was a joint venture validly formed and existing under the law of the State of California. All of the venturers in Petitioner are individuals: They are Arch MacDonald, a resident of Santa Clara County, State of California; Ralph S. Sommer, a resident of Alameda County, State of California; and Frank V. Frates, a resident of Sacramento County, State of California.

2. Respondent County of Yolo ("County") is now and at all times relevant hereto was a political subdivision and a general law county of this State, charged with the duties and obligations and exercising the rights and privileges of such an entity under the Constitution and statutes of the State of California.

3. Respondent City of Davis ("City") is now and at all times relevant hereto was a municipal corporation and a general law city of this State charged with the duties and obligations and exercising the rights and privileges of such an entity under the Constitution and statutes of the State of California.

B. STATEMENT OF FACTS

(1) LOCATION AND PHYSICAL CHARACTERISTICS OF THE SUBJECT PROPERTY AND PLACE AS A FACTOR ON THE REGIONAL HOUSING MARKET

4. On or about October 12, 1971, Petitioner acquired fee title to a certain parcel of real property (the "Property"), located in the County of Yolo, State of California. The Property is more particularly described in Exhibit A, attached hereto and incorporated herein by this reference. Petitioner purchased the Property for good and valuable consideration. The property lies within the boundaries of County, and outside the corporate boundaries of City. The boundaries of City are now contiguous with one boundary of the Property after a series of annexations. The Property is shown on the plat attached hereto, marked Exhibit B, and incorporated herein by this reference. The present corporate boundaries of City are also delineated on the plat as well as other boundaries and features more particularly described below.

5. Petitioner is now and at all times relevant hereto was the owner of a second parcel of real property ("the Connecting Property") located in the County of Yolo, State of California. The Connecting Property is within the corporate boundaries of City and lies between the Property and the easternmost extension of Cowell Boulevard, a public street of City. The Connecting Property is also shown on Exhibit B attached hereto.

6. The Property is generally flat. It lacks any unique scenic value, topographical or geographical features. It is not physically divided from neighboring property by any natural or man-made physical feature which would serve as an imped-

iment to development. No soils, geologic, drainage or other condition exists on the Property which would render development unfeasible or difficult. THE PROPERTY IS CURRENTLY SHOWN ON COUNTY'S GENERAL PLAN AND ZONED UNDER COUNTY'S ZONING ORDINANCES FOR USE AS SINGLE-FAMILY AND MULTIPLE RESIDENTIAL, a use for which the property has been designated on County's general plan and zoning ordinances since 1966.

7. The Property immediately adjoins land shown on Exhibit B which has been developed for single-family residential purposes. The Property also lies within approximately two hundred (200) yards of a parcel ("the Simmon's Parcel") shown on Exhibit B which has been approved for annexation to City and for immediate single-family residential use and development. In physical features and characteristics, the Property is indistinguishable from the Simmon's Parcel and other land upon which development has been permitted to proceed, except that the Property is actually inferior to most of these other lands in its capacity for agricultural use.

8. The Property is located within a regional community comprising City and its environs as well as an area commonly known as "East Yolo", "West Sacramento", and portions of Sacramento and Solano Counties. This region constitutes a single housing and socio-economic unit. Persons employed within any portion of the region require housing therein. Centers of employment located therein create a demand for housing which may be filled by supplies of housing provided anywhere within the region. Currently, a severe shortage of housing of all types, but particularly single-family residential detached housing, exists within the region. The Property is ideally suited for construction of such housing. City and County have a duty to permit and facilitate construction of such housing for the general welfare of all of the citizens affected by their actions.

9. The Property is not suitable for agricultural uses for a variety of reasons. Specifically, but without limitation, the fertile topsoil was removed from the property for use in constructing Interstate 80. At that time, the Property was

expressly designated in County's general plan and applicable zoning ordinances for residential use. Removal of the topsoil was under express threat of condemnation. The soil is infested with nematodes which destroy crops; or to the extent that they do not bring about outright destruction, greatly increase farming expense. The proximity of residential development makes aerial application of pesticides and fertilizers impractical and sharply inhibits other methods of application. The proximity of developed lands thus would make cultivation economically unprofitable even if the Property had topsoil and no nematodes.

10. Provision of goods and services to the Property necessary for purposes of efficient residential development is physically possible and economically feasible. The Property is directly adjacent to the Connecting Property owned by Petitioner, which in turn is served by a developed public street which can readily be extended through the Connecting Property to serve the Property. For many years (as more particularly alleged below) the Property has been included within the El Macero Sewer Assessment District of County ("District") for the express purpose of service by a sanitary sewage disposal system. Domestic water is available as are police and fire protection services on immediately adjoining property. As more particularly alleged below, however, City and County have (i) denied all access to the Property from existing developed public streets by refusing to permit connection thereto, (ii) deprived the Property of the benefits of sanitary sewage disposal service notwithstanding that petitioner and its predecessors in interest have paid assessments for such service for many years, (iii) denied that available domestic water exists despite proven sources of supply on the Property and nearby adequate for serving the Property, and (iv) refused to permit provision of fire and police protection services to the Property even though such services could be provided for a lesser amount than the tax revenues generated from development of the Property to pay for said services and the services could feasibly be provided by expansion of governmental entities immediately adjoining the Property. As a result, County and City have deprived the Property of any beneficial use which is

not (a) economically infeasible, (b) prohibited by law, or (c) prevented by actions taken by City and County. Specifically, but without limiting the generality of the foregoing, the Property cannot be utilized for any of the beneficial uses enumerated in Yolo County Code Section 8-2.502 or Yolo County Code Section 8-2.504 or for any other use permitted or allegedly permitted, as a result of the actions of County as hereinafter alleged.

11. But for the actions of Respondents, herein alleged, the Property could be beneficially used for residential development. The highest and best use of the property is for single-family and multiple residential purposes.

(2) SEWER AND DRAINAGE IMPROVEMENTS

12. On or about October 16, 1961, the Board of Supervisors of County, by Resolution No. 61-132, created District for the purpose of assessing lands to raise funds for construction of a sanitary sewage treatment plant and related facilities. The Property was included within the lands to be assessed and served by the improvements to be constructed with the assessment proceeds. Thereafter, in 1966, City procured annexation of approximately 760 acres of land lying within District and assumed responsibility for governmental services formerly provided therein by County. These included certain governmental services for the Property. On or about October, 1968, the El Macero County Service Area was created by resolution of the Board of Supervisors of County to perform certain maintenance services with respect to improvements constructed with the proceeds of District assessments.

13. In 1970, City created Davis Municipal Sewer Facilities No. 1 and undertook jointly with District to construct a sewer interceptor line and related drainage facilities to serve the area allegedly benefited, which area included the Property. On or about April 27, 1973, City, acting for itself and as agent for County and District, filed a certain "Application For Grant Contract" with the United States Environmental Protection Agency ("EPA") and the California State Water Resources Control Board ("State Water Board") seeking state and federal funds to assist in constructing the sewer and drainage improve-

ments. In that application, City, with the knowledge and consent of County and District, represented to the State Water Board and the EPA that the improvements to be constructed within District were intended to serve a population calculated by assuming development of the Property.

14. In December of 1973 and continuing through 1974, City, County and District revised the sewer project in various ways. Among other things, they adjusted the boundaries of the area to be served (and pursuant thereto adopted and executed Agreement No. 74-214) so as to exclude the Property from service and redesigned the proposed project improvements, reducing their size and service capabilities. These changes were concurrent with adoption of an amendment to the Davis General Plan: (i) revising downward projected population growth; (ii) reducing the maximum ultimate population of District; and (iii) adopting the restrictive and parochial policies which violate City's duty to provide for regional housing need. Although County did not correspondingly revise its General Plan and zoning ordinances and although the Property remained in County, County agreed with City to implement City's illegal policies as more particularly described below.

15. Notwithstanding their reduction of the population to be served by the sewer project, the revision of the service area boundaries and the revision in the proposed project improvements reducing their size and service capabilities, City, on behalf of County, District and itself, pressed their application for state and federal grant funds with the EPA and the State Water Board, using the original population figures, boundaries and proposed improvements. In so doing, County, City and District made express representations to federal and state authorities, which County, City and District knew to be false, in order to obtain funds to which City, County and District would not otherwise be entitled. While maintaining to State and Federal authorities that they intended to serve a certain level of population and area, including population to reside on the Property, City, County and District had decided to prevent any such development from ever taking place. In so doing, City, County and District conspired in a scheme to defraud the State and Federal Governments.

16. From the date District was formed until now, Petitioner has paid approximately Seventy-Five Thousand Dollars (\$75,000) in assessments to District with respect to the Property. Petitioner will seek leave to amend this Petition when the exact amount of assessments paid to district with respect to the Property has been ascertained. The assessments were levied expressly on the basis that the Property would be benefited by use of the improvements to be constructed by or for District. Since that time, however, City, County and District have acted deliberately and intentionally to prevent the Property from being developed so as to make use of, and to realize the benefits of, the improvements for which the Property has been and is still being assessed. Thus, there has been a total failure of consideration for the assessments and a complete deprivation of the use and benefit to the Property on which they were based.

(3) PETITIONER'S SUBDIVISION MAP

17. On or about April 5, 1975, Petitioner filed an application for approval of a subdivision map with County, seeking permission to subdivide the Property into one hundred fifty-nine (159) residential lots and to construct all public improvements required to serve the subdivision in accordance with the terms of the California Subdivision Map Act and the subdivision ordinances of County. Petitioner's application complied in all respects with all applicable laws, and provided for design and improvement of the subdivision in accordance with County standards. In its application and thereafter, Petitioner demonstrated the ability to provide public access by public streets, adequate water, sewer and other public utility services.

18. In response to Petitioner's application, City undertook several acts for the deliberate and avowed purpose of preventing County from approving Petitioner's application. Among other things, City:

(a) Advised County that the Property had been duly designated "Agricultural Preserve" and more recently "Agricultural Reserve" on City's applicable General Plan Map, a statement which, Petitioner alleges on information

and belief, was false when made. Petitioner further alleges on information and belief that the statement was known to be false by the person who made it (City's Director of Community Development) and that it was made for the purpose of preventing County's approval of Petitioner's subdivision;

(b) Approved a subdivision map on the Simmon's Parcel shown on Exhibit B conditioned upon that Parcel's annexation to the City and upon development of a street configuration thereon which would deprive the Property of access to public streets;

(c) Refused to accept dedication of portions of the Connecting Property for the purpose of extending Cowell Boulevard as a dedicated public street to serve the Property, refused to permit said Boulevard's extension to the Property as a private road, and refused to permit County or any other governmental entity to extend and/or maintain said Boulevard on the Connecting Property; and

(d) Announced that it would refuse to accept dedications of public facilities, refuse to accept annexation of the Property and refuse to provide any City services thereto.

In making these statements and representations, City purported to be acting pursuant to a policy of preserving "prime agricultural lands" and preventing development of lands for which there are no immediately available City services. At times past and present, however, City has permitted development of other properties for which such services were not immediately available, and both City and County have acted to facilitate development of other properties which were usable as prime agricultural lands, a use to which the Property is not suited. City's and County's positions are inconsistent, discriminatory, arbitrary and unreasonable. They reflect an attitude of inflamed prejudice rather than rational implementation of governmental policy. Their actions constitute a deprivation of access to the Property, and a taking of the Property for public purposes; as an open space buffer and growth cap against regional growth needs emanating from the East Yolo and West Sacramento area, in violation of Article I, Section 19 of the California Constitution.

19. Although the Property lies outside the boundaries of City, County implements City policy with respect to the Property. Sometime during 1975, County formally stated the policy of refusing to permit development except within the boundaries of incorporated cities. County applies this policy unevenly, permitting development to proceed within the El Macero County Services Area and in other unincorporated portions of the "East Yolo" region. County has applied the policy with respect to the Property, however, and with respect to certain other lands in the vicinity of City. In so doing, County has unlawfully delegated its planning and land-use regulatory functions and responsibilities to City, and has unlawfully abrogated its own General Plan and zoning ordinances.

20. BY MINUTE ORDER DATED JUNE 14, 1977, COUNTY REJECTED PETITIONER'S APPLICATION FOR SUBDIVISION OF THE PROPERTY AND ADOPTED A FINAL NOTICE OF DETERMINATION AND FINDINGS, DECISIONS AND ORDER ON APPEAL, A TRUE AND CORRECT COPY OF WHICH IS ATTACHED HERETO, MARKED EXHIBIT C AND INCORPORATED HEREIN BY THIS REFERENCE. This Minute Order was adopted after a hearing by the Board of Supervisors of County to consider an earlier Notice of Determination and Findings, Decisions and Order on Appeal, a true and correct copy of which is attached hereto, marked Exhibit D, and incorporated herein by this reference. The Minute Order of June 14, 1977 represents County's final action in the subdivision proceedings herein described. Representatives of City appeared throughout the subdivision proceedings before County and maintained the spurious, unlawful and fraudulent positions above described.

21. IN DENYING PETITIONER'S SUBDIVISION APPLICATION, COUNTY DETERMINED THAT THE PROPERTY COULD ONLY BE USED FOR AGRICULTURAL PURPOSES, WHILE ACKNOWLEDGING THAT THE PROPERTY IS AGRICULTURALLY IMPAIRED, AND DENIED TO PETITIONER ANY OTHER USE THEREOF NOTWITHSTANDING THAT PETITIONER'S SUBDIVISION MAP PROPOSED A USE EXPRESSLY PERMITTED BY COUNTY'S GENERAL PLAN AND ZONING ORDI-

NANCES. In reaching its conclusion, County applied the policy of City relegating the land to agricultural uses. Such a land-use designation deprives Petitioner of the entire economic use of the Property for the sole purpose of appropriating the land to a public open-space buffer use for the benefit of City and County, to carry out a deliberate policy in direct derogation of the obligation of City and County to provide for housing to meet regional housing needs.

C. BASES FOR RELIEF

22. In disapproving Petitioner's tentative subdivision map County proceeded without or in excess of its jurisdiction by law in that County:

(a) Violated its affirmative legal duty to regulate land use so as to meet the need for adequate and affordable housing for those persons desiring to reside within the region in which Petitioner's Property is located;

(b) Acted in contravention of County's own general plan and zoning ordinances pursuant to which Petitioner's Property is designated for residential use;

(c) Restricted Petitioner's Property to agricultural uses which are of no economic benefit to Petitioner, thereby taking Petitioner's property without compensation in violation of the Constitutions of the United States and of this State;

(d) Deprived Petitioner of all access to its Property suitable for any use from which Petitioners can derive economic benefit from the Property, thereby damaging and/or taking Petitioner's property without compensation in violation of the Constitutions of the United States and of this State;

(e) Deprived Petitioner of the ability to use the Property for any purposes from which Petitioner can obtain the benefit of the special assessments levied against the Property by District and paid by Petitioners to District; and

(f) Abandoned and surrendered to City its legal duty and responsibility to regulate land use in accordance with County's own policies, plans and zoning, and the general welfare, by permitting and sanctioning application of City's policies and plans to Petitioner's Property, over which City has no jurisdiction.

23. In disapproving Petitioner's tentative subdivision map County abused its discretion to Petitioner's prejudice in that County:

(a) Ignored all evidence in the record concerning critical regional housing needs and the suitability of Petitioner's Property for residential development that would assist County and other concerned jurisdictions to meet such needs;

(b) Ignored the provisions of its own general plan and zoning ordinances with respect to Petitioner's Property;

(c) Deprived Petitioner of the ability to use the Property for any purposes from which Petitioner can obtain the benefit of the special assessments levied against the Property by District and paid by Petitioners to District;

(d) Abandoned and surrendered to City its legal duty and responsibility to regulate land use in accordance with County's own policies, plans and zoning, and the general welfare, by permitting and sanctioning application of City's policies and plans to Petitioner's Property, over which City has no jurisdiction; and

(e) Made findings which are not supported by the weight of the evidence, and/or by substantial evidence in light of the whole record, in respect of:

(1) Consistency of Petitioner's proposal with the County's General Plan and Zoning Regulations.

(2) Suitability of Petitioner's Property for agricultural use.

(3) Availability of adequate access to Petitioner's Property suitable for residential purposes.

(4) Availability of adequate sewer service to the Property if developed for residential purposes.

(5) Availability of sufficient police protection to the Property if developed for residential purposes.

(6) Availability of sufficient water service to the Property if developed for residential purposes.

(7) Community need for Petitioner's proposed subdivision.

24. Petitioner has exhausted all of its administrative remedies with respect to County's disapproval of Petitioner's tentative subdivision map, in that no further administrative appeal is provided from the final adverse decision of County's Board of Supervisors made on June 14, 1977.

25. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, other than the relief sought by this petition, to compel respondent County to vacate and set aside its decision disapproving Petitioner's tentative subdivision map for the subject Property and to reconsider Petitioner's application for approval of said map in light of the Court's opinion and judgment herein.

26. Petitioner is informed and believes, and thereon alleges, that the documents filed herein by Petitioner on or about October 14, 1977 with the original Petition in this proceeding are true and correct portions of the record of the administrative proceedings held before County in this matter. Petitioner reserves the right hereafter to correct or to supplement said record.

WHEREFORE, Petitioner respectfully prays that this Court:

1. Issue its alternative writ of mandate pursuant to Code of Civil Procedure § 1094.5 directing County to vacate and set aside its decision of June 14, 1977 disapproving Petitioner's tentative subdivision map or, in the alternative, to show just cause at a time and place fixed by this Court why it has not done so and why the Court should not issue its peremptory writ of mandate commanding County to do so;

2. Issue its peremptory writ of mandate, after hearing, commanding County to set aside its decision of June 14, 1977 disapproving petitioner's tentative subdivision map and to reconsider petitioner's application for approval and said map in light of the court's opinion and judgment herein;

3. Allow petitioner its costs of suit, including a reasonable attorneys' fee; and

4. Grant petitioner such other and further relief as to the court shall seem just and proper.

DATED: January 23, 1981

Edward R. MacDonald
Attorney for Petitioner

(Verification Omitted in Printing)

**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

**NOTICE OF REQUEST FOR
TAKING JUDICIAL NOTICE**

(Title Omitted in Printing)

TO: PLAINTIFFS ABOVE NAMED AND TO THEIR ATTORNEYS OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on May 5, 1981, at 9:00 a.m., or as soon thereafter as the matter can be heard in the law and motion department of the above entitled Court, Yolo County Courthouse, Woodland, California, defendant CITY OF DAVIS will request the Court to take judicial notice of the following items:

- a. All the records, files and proceedings in this action.
- b. The local zoning codes and ordinances of defendants.
- c. The companion administrative mandate case (Yolo County Superior Court No. 36657).
- d. The "Assignment of Rents and Deed of Trust" attached hereto as Exhibit "A."
- e. The certified copy of the Yolo County Assessor's map of the plaintiffs' property attached hereto as Exhibit "A-1."
- f. The fact that a commercial crop is presently growing on the property.
- g. The scientific fact that the existence of nematodes in land does not preclude its use for raising crops.

Said request will be based on this Notice of Request; the attached certified copies; the attached Declaration of Winfield H. Hart; the attached memorandum of points and authorities; such supplemental information as may be filed subsequently herein; such supplemental memoranda of points and authorities

as may be filed subsequently herein; and all oral and documentary evidence that may be presented on the hearing of said request.

DATED: April 17, 1981.

LOUIS B. GREEN, ESQ.
McDONOUGH, HOLLAND &
ALLEN
A Professional Corporation

By _____
William L. Owen
Attorneys for the City of Davis

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATUTORY LAW—EVIDENCE CODE SECTIONS 451 and 452

Evidence Code Section 453

"The trial court shall take judicial notice of any matters specified in section 452 if a party requests it and;

"(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

"(b) Furnishes the Court with sufficient information to enable it to take judicial notice of the matter."

II

THE RECORDS, FILES AND PROCEEDINGS IN THIS ACTION ARE JUDICIALLY NOTICEABLE ON DEMURRER

Evidence Code section 452 allows judicial notice to be taken of "(d) records of (1) any court of this State . . ."

Judicial notice on demurrer may even be taken of evidentiary matters which are contained in the Court's own records. In *Able v. Van Der Zee* (1967) 256 Cal.App.2d 728, 734 the Court held:

"It is generally not proper for the Court to refer to extrinsic material facts in ruling on a general demurrer, for the obvious reason that only the law is presented for the Court's consideration. This rule occasionally, however, has been relaxed in order to allow the Court to take judicial notice of evidentiary matters in its own records, including affidavits, declarations, and interrogatories or requests for admissions, which are inconsistent with the allegations in the complaint."

The *Able* case has been followed in *Middlebrook-Anderson Co. v. Southwest Savings and Loan Association* (1971) 18 Cal.App.3d 1023, 1038 where the Court took judicial notice of answers to-interrogatories.

Judicial notice is requested of the original Complaint and the points and authorities submitted by the respective parties regarding the demurrer to the original Complaint for the convenience of all parties and the Court and in the interests of limiting the volume of the papers filed herein.

Judicial notice is requested of the Order Sustaining the Demurrer to the original Complaint on the additional ground that it constitutes part of the decisional law of this State under Evidence Code section 451(a).

III

THE LOCAL ZONING CODES AND ORDINANCES OF DEFENDANTS ARE SUBJECT TO JUDICIAL NOTICE

Judicial notice is requested of the local zoning codes of defendants under Evidence Code section 352(b) and *City of Los Angeles v. Wolfe*, 6 Cal.3d 326.

IV

THE COMPANION ADMINISTRATIVE MANDATE CASE IS SUBJECT TO JUDICIAL NOTICE

Judicial notice is requested of the companion administrative mandate case (Yolo County Superior Court No. 36657) under Evidence Code section 452(d)(1) and Evidence Code section 452(h).

V

THE DEED OF TRUST FILED WITH THE YOLO COUNTY CLERK IS SUBJECT TO JUDICIAL NOTICE

Judicial notice is requested of the "Assignment of Rents and Deed of Trust" attached hereto as Exhibit "A" under Evidence Code section 452(h). The certified copy of the Deed of Trust shows that it has been recorded in the Official Records of the County of Yolo and the accuracy of the certified copy are not reasonably subject to dispute and can be verified immediately and accurately by reference to the Official Records. It is

therefore capable of being judicially noticed under Evidence Code section 452(h).

VI

THE ASSESSOR'S MAP IS SUBJECT TO JUDICIAL NOTICE

Judicial notice is requested of the certified copy of the Assessor's Map of the property attached hereto as Exhibit "A-1" under Evidence Code section 452(h). Said map is not submitted to show its unerring accuracy but rather to correlate the reference in the Deed of Trust to Exhibit "B" to the First Amended Complaint. The Assessor's parcel number appears on the Deed of Trust and on the Assessor's map. As a frame of reference the City boundary appears on the Assessor's map and on Exhibit "B" to the First Amended Complaint. The map is used by the County Assessor and is not reasonably subject to dispute and is capable of immediate and accurate verification by resort to the County Assessor, a source of reasonably indisputable accuracy, all as is required by Evidence Code section 452(h).

VII

THE EXISTENCE OF COMMERCIAL AGRICULTURAL CROP ON THE PROPERTY IS SUBJECT TO JUDICIAL NOTICE

Pursuant to Evidence Code section 452(h), judicial notice is requested of the fact that there is a commercial agricultural crop presently growing on the property. The existence of the crop is not reasonably subject to dispute and immediate and accurate determination of the truth of this fact can be made by the Court or by any person simply by viewing the property.

VIII

THE SCIENTIFIC FACT THAT NEMATODES DO NOT PRECLUDE RAISING CROPS IS SUBJECT TO JUDICIAL NOTICE

Judicial notice is requested under Evidence Code sections 452(g) and (h) of the scientific fact that the existence of

nematodes in land does not preclude its use for raising crops. This fact is accepted as established by experts and specialists in the field and they are of such wide acceptance that to submit them to the jury would be to risk irrational findings. See Evidence Code section 452, Comment.

The attached declaration of Winfield H. Hart, Ph.D., is submitted to the Court in order to furnish the Court with sufficient information to enable it to take judicial notice of this fact. See Evidence Code section 453(b) and Exhibit "C." Resort to "the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party." Evidence Code section 454(a)(1).

It should be noted that this fact has also been admitted by plaintiffs in their response to the Request for Admissions propounded by the CITY OF DAVIS. (Exhibit "B" attached hereto.)

IX

CONCLUSION

Based on the above arguments and authority the Court may and should take, judicial notice of each and all of the items requested.

DATED: April 17, 1981.

Respectfully submitted,

LOUIS B. GREEN, ESQ.

MCDONOUGH, HOLLAND &
ALLEN

A Professional Corporation

By _____

WILLIAM L. OWEN
Attorneys for Defendant
CITY OF DAVIS

**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

NOTICE OF REQUEST FOR JUDICIAL NOTICE

(Title Omitted in Printing)

**TO PLAINTIFF, MACDONALD, SOMMER & FRATES, A
JOINT VENTURE, AND TO MACDONALD, TERANISHI
& BESNEATTE, ITS ATTORNEYS:**

PLEASE TAKE NOTICE, that on August 3, 1981, at 1:30 p.m., or as soon thereafter as the matter can be heard, in Dept. 3 of the above entitled court, Yolo County Courthouse, Woodland, California, defendant, COUNTY OF YOLO, will request the court to take judicial notice of the following items:

1. All of the records, files and proceedings in this action.
2. The local zoning codes and ordinances of defendants.
3. The companion administrative mandate case (Yolo County Superior Court No. 36657).
4. The "Assignment of Rents and Deed of Trust" which is Exhibit "A" to the Notice of Request for Taking Judicial Notice filed by the City of Davis and dated April 17, 1981 (hereinafter called Davis' Request).
5. The certified copy of Yolo County assessor's map of plaintiff's property attached to Davis' Request as Exhibit "A-1."
6. The fact that a commercial crop is presently growing on the property.
7. The scientific fact that the existence of nematodes in land does not preclude its use for raising crops.

Said request will be based on this Notice of Request, the certified copies attached to Davis' Request, the Declaration of Winfield H. Hart submitted with Davis' Request, the attached Memorandum of Points and Authorities and the Memorandum of Points and Authorities submitted with Davis' Request, and such supplemental oral and documentary matter that may be presented on the hearing of this Request.

DATED: June 23, 1981.

MCDONALD, SAELTZER, MORRIS
& CAULFIELD

By _____
Eugene W. Saeltzer

SUPERIOR COURT OF CALIFORNIA, COUNTY OF YOLO

FOURTH AMENDED COMPLAINT FOR DECLARATORY RELIEF, DAMAGES IN INVERSE CONDEMNATION, RECOVERY OF TAXES AND ASSESSMENTS, AND VIOLATION OF CIVIL RIGHTS ACT OF 1871.

(Title Omitted in Printing)

Plaintiff complains of defendants and for its causes of action alleges:

ALLEGATIONS APPLICABLE TO ALL CAUSES OF ACTION

A. THE PARTIES

Plaintiff is now and at all times relevant hereto was a joint venture validly formed and existing under the law of the State of California. All of the venturers in Plaintiff are individuals: they are Arch MacDonald, a resident of Santa Clara County, State of California, Ralph S. Sommer, a resident of Alameda County, State of California, and Frank V. Frates, a resident of Sacramento County, State of California.

2. Defendant County of Yolo ("County") is now and at all times relevant hereto was a political subdivision and a general law county of this State, charged with the duties and obligations and exercising the rights and privileges of such an entity under the Constitution and statutes of the State of California.

3. Defendant El Macero Sewer Assessment District ("District") is now and at all times relevant hereto was an agency and instrumentality of defendant County, established by County for the purposes *inter alia* of providing sewage collection treatment and disposal facilities and services to those properties located within its boundaries, including the Property owned by plaintiff which is the subject of this action.

4. Defendant John L. Dahler is Treasurer of defendant County and is charged by law for collecting, retaining and disbursing funds belonging to County, its agencies and instrumentalities.

5. Defendant City of Davis ("City") is now and at all times relevant hereto was a municipal corporation and a general law city of this State charged with the duties and obligations and exercising the rights and privileges of such an entity under the Constitution and statutes of the State of California.

B. FACTS APPLICABLE TO ALL CAUSES OF ACTION

(1) LOCATION, PHYSICAL CHARACTERISTICS OF THE SUBJECT PROPERTY AND BENEFICIAL USES THEREOF.

6. On or about October 12, 1971, Plaintiff acquired fee title to a certain parcel of real property (the "Property"), located in the County of Yolo, State of California. The Property is more particularly described in Exhibit A, attached hereto and incorporated herein by this reference. Plaintiff purchased the Property for good and valuable consideration. The Property lies within the boundaries of County, and outside the corporate boundaries of City. The boundaries of City are now contiguous with one boundary of the Property after a series of annexations. The Property is shown on the plat attached hereto, marked Exhibit B, and incorporated herein by this reference. The present corporate boundaries of City are also delineated on the plat as well as other boundaries and features more particularly described below.

7. Plaintiff is now and at all times relevant hereto was the owner of a second parcel of real property ("the Connecting Property") located in the County of Yolo, State of California. The Connecting Property is within the corporate boundaries of City and lies between the Property and the easternmost extension of Cowell Boulevard, a public street of the City. The Connecting Property is also shown on Exhibit B attached hereto.

8. The Property is generally flat. It lacks any unique scenic value, topographical or geographical features. It is not physically divided from neighboring property by any natural or man-made physical feature which would serve as an impediment to development. No soils, geologic, drainage or other conditions exists on the Property which would render development unfeasible or difficult. **THE PROPERTY IS CURRENTLY SHOWN ON COUNTY'S GENERAL PLAN AND ZONED UNDER COUNTY'S ZONING ORDINANCES FOR USE AS A SINGLE FAMILY AND MULTIPLE RESIDENTIAL**, a use for which the property has been designated on County's general plan and zoning ordinances since 1966.

9. The Property immediately adjoins land shown on Exhibit B which has been developed for single-family residential purposes. The Property also lies within approximately two hundred (200) yards of a parcel ("the Simmon's Parcel") shown on Exhibit B which has been approved for annexation to City and for immediate single-family residential use and development. In physical features and characteristics, the Property is indistinguishable from the Simmon's Parcel and other land upon which development has been permitted to proceed, except that the Property is actually inferior to most of these other lands in its capacity for agricultural use.

10. The Property is located within a regional community comprising City and its environs as well as an area commonly known as "East Yolo", "West Sacramento", and portions of Sacramento and Solano Counties. This region constitutes a single housing and socio economic unit. Persons employed within any portion of the region require housing therein. Centers of employment located therein create a demand for housing which may be filled by supplies of housing provided anywhere within the region. Currently, a severe shortage of housing of all types, but particularly single-family residential detached housing exists within the region. The Property is ideally suited for construction of such housing. City and County have a duty to permit and facilitate construction of such housing for the general welfare of all of the citizens affected by their actions.

11. The Property is not suitable for agricultural uses for a variety of reasons. Specifically, but without limitation, the fertile topsoil was removed from the property for use in constructing Interstate 80. At that time, the Property was expressly designated in County's general plan and applicable zoning ordinances for residential use. Removal of the topsoil was under express threat of condemnation. The soil is infested with nematodes which destroy crops; or to the extent that they do not bring about outright destruction, greatly increase farming expense. The proximity of residential development makes aerial application of pesticides and fertilizers impractical and sharply inhibits other methods of application. The proximity of developed land thus would make cultivation economically unprofitable even if the Property had topsoil and no nematodes.

12. Provision of goods and services to the Property necessary for purposes of efficient residential development is physically possible and economically feasible. The Property is directly adjacent to the Connecting Property owned by plaintiff, which in turn is served by a developed public street which can readily be extended through the Connecting Property to serve the Property. For many years (as more particularly alleged below) the Property has been included within District for the express purpose of service by a sanitary sewage disposal system. Domestic water is available as are police and fire protection services on immediately adjoining property. As more particularly alleged below, however, City and County have (i) denied all access to the Property from existing developed public streets by refusing to permit connection thereto, (ii) deprived the Property of the benefits of sanitary sewage disposal service notwithstanding that Plaintiff and its predecessors in interest have paid assessments for such service for many years, (iii) denied that available domestic water exists despite proven sources of supply on the Property and nearby adequate for serving the Property, and (iv) refused to permit provision of fire and police protection services to the Property even though such services could be provided for a lesser amount than the tax revenues generated from development of the Property to pay for said services and the services could feasibly be provided by expansion of governmental entities immediately adjoining the

Property. As a result, County and City have deprived the Property of any beneficial use which is not (a) economically infeasible, (b) prohibited by law, or (c) prevented by actions taken by City and County. Specifically, but without limiting the generality of foregoing, the Property cannot be utilized for any of the beneficial uses enumerated in Yolo County Code Section 8-2.502 or Yolo County Code Section 8-2.504 or for any other use permitted or allegedly permitted, as a result of the action of County as hereinafter alleged.

13. But for the actions of defendants, herein alleged, the Property could be beneficially used for residential development. The highest and best use of the Property is for single-family and multiple residential purposes.

(2) PUBLIC ACTIONS AFFECTING USE OF THE PROPERTY PRIOR TO JANUARY 1, 1976.

(a) SEWER AND DRAINAGE IMPROVEMENTS

14. By the actions alleged in this Section, City and County and District have unlawfully acted to deprive the Property of sanitary sewage and storm drainage service, after City, County and District had first determined to provide such service and that provision of such service was feasible, and after levying and collecting substantial assessments against the Property for construction of sanitary sewer and storm drainage improvements in express contemplation of residential development. In deciding to deprive the Property of such services, City, County and District have acted for the express purpose of implementing a land-use control policy restricting the Property to an open-space agricultural use by denying all permit applications, subdivision maps and other requests to implement any other use which applicable zoning or general plans might permit.

15. On or about October 16, 1961, the Board of Supervisors of County, by resolution No. 61-132, created District for the purpose of assessing lands to raise funds for construction of a sanitary sewage treatment plant and related facilities. The Property was included within the lands to be assessed and served by the improvements to be constructed with the assessment proceeds. Thereafter, in 1966, City procured annexation

of approximately 760 acres of land lying within District and assumed responsibility for governmental services formerly provided therein by County. These included certain governmental services for the Property. On or about October, 1968, the El Macero County Service Area was created by resolution of the Board of Supervisors of County to perform certain maintenance services with respect to improvements constructed with the proceeds of District assessments.

16. In 1970, City created Davis Municipal Sewer Facilities No. 1 and undertook jointly with District to construct a sewer interceptor line and related drainage facilities to serve the area allegedly benefited, which area included the Property. On or about April 27, 1972, City, acting for itself and as agent for County and District, filed a certain "Application for Grant Contract" with the United States Environmental Protection Agency ("EPA") and the California State Water Resources Control Board ("State Water Board") seeking state and federal funds to assist in constructing the sewer and drainage improvements. In that application, City, with the knowledge and consent of County and District, represented to the State Water Board and the EPA that the improvements to be constructed within District were intended to serve a population calculated by assuming development of the Property.

17. In December of 1973 and continuing through 1974, City, County and District revised the sewer project in various ways. Among other things, they adjusted the boundaries of the area to be served (and pursuant thereto adopted and executed Agreement 74-214) so as to exclude the Property from service and redesigned the proposed project improvements, reducing their size and service capabilities. These changes were concurrent with adoption of an amendment to the Davis General Plan: (i) revising downward projected population growth; (ii) reducing the maximum ultimate population of District; and (iii) adopting the restrictive and parochial policies which violate City's duty to provide for regional housing need. Although County did not correspondingly revise its General Plan and zoning ordinances and although the Property remained in the County, County agreed with City to implement City's illegal policies as more particularly described below.

18. Notwithstanding their reduction of the population to be served by the sewer project, the revision of the service area boundaries and the revision in the proposed project improvements reducing their size and service capabilities, City, on behalf of County, District and itself, pressed their application for state and federal grant funds with the EPA and the State Water Board, using the original population figures, boundaries and proposed improvements. In so doing, County, City and District made express representations to federal and state authorities, which County, City and District knew to be false, in order to obtain funds to which City, County and District would not otherwise be entitled. While maintaining to State and Federal authorities that they intended to serve a certain level of population and area, including population to reside on the Property, City, County and District had decided to prevent any such development from ever taking place. In so doing, City, County and District conspired in a scheme to defraud the State and Federal Government.

19. From the date District was formed until now, Plaintiff has paid approximately Seventy-Five Thousand Dollars (75,000) in assessments to District with respect to Property. Plaintiff will seek leave to amend this Complaint when the exact amount of assessments paid to District with respect to the Property has been ascertained. The assessments were levied expressly on the basis that the Property would be benefited by use of the improvements to be constructed by or for District. Since that time, however, City, County and District have acted deliberately and intentionally to prevent the Property from being developed so as to make use of, and to realize the benefits of, the improvements for which the Property has been and is still being assessed. Thus, there has been a total failure of consideration for the assessments and a complete deprivation of the use and benefit to the Property on which they were based.

(b) DENIAL OF ALL BENEFICIAL USE FOR THE PROPERTY IN ORDER TO APPROPRIATE THE PROPERTY FOR OPEN-SPACE AND GROWTH LIMITATION USES

20. On or about April 5, 1975, Plaintiff filed an application for approval of a subdivision map with County, seeking permission to subdivide the Property into one hundred fifty-nine (159) residential lots and to construct all public improvements required to serve the subdivision in accordance with the terms of the California Subdivision Map Act and the subdivision ordinances of County. Plaintiff's application complied in all respects with all applicable laws, and provided for design and improvement of the sub-division in accordance with County standards. In its application and thereafter, Plaintiff demonstrated the ability to provide public access by public streets, adequate water, sewer and other public utility services.

21. In response to Plaintiff's application, City undertook several acts for deliberate and avowed purpose of preventing County from approving Plaintiff's application. Among other things, City:

(a) Advised County that the Property had been duly designated "Agricultural Preserve" and more recently "Agricultural Reserve" on City's applicable General Plan Map, a statement which, Plaintiff alleges on information and belief, was false when made. Plaintiff further alleges on information and belief that the statement was known to be false by the person who made it (City's Director of Community Development) and that it was made for the purpose of preventing County's approval of Plaintiff's subdivision;

(b) Approved a subdivision map on the Simmon's Parcel shown on Exhibit B conditioned upon that Parcel's annexation to the City and upon development of a street configuration thereon which would deprive the Property of access to public streets;

(c) Refused to accept dedication of portions of the Connecting Property for the purpose of extending Colwell

Boulevard as a dedicated public street to serve the Property, refused to permit said Boulevard's extension to the Property as a private road, and refused to permit County or any other governmental entity to extend and/or maintain said Boulevard on the Connecting Property; and

(d) Announced that it would refuse to accept dedications of public facilities, refuse to accept annexation of the Property and refuse to provide any City services thereto.

In making these statements and representations, City purported to be acting pursuant to a policy of preserving "prime agricultural lands" and for purposes of preventing development of lands for which there are no immediately available City services. At times past and present, however, City has permitted development of other properties for which such services were not immediately available, and both City and County have acted to facilitate development of other properties which were usable as prime agricultural lands, a use to which the Property is not suited. City's and County's positions are inconsistent, discriminatory, arbitrary and unreasonable. They reflect an attitude of inflamed prejudice rather than rational implementation of governmental policy. Their actions constitute a deprivation of access to the Property, and a taking of the Property for public purposes; as an open space buffer and growth cap against regional growth needs emanating from the East Yolo and West Sacramento area, in violation of Article 1, Section 19 of the California Constitution.

22. Although the Property lies outside the boundaries of City, County implements City policy with respect to the Property. Sometime during 1975, County formally stated the policy of refusing to permit development except within the boundaries of incorporated cities. County applies this policy unevenly, permitting development to proceed within the El Macero County Services Area and in other unincorporated portions of the "East Yolo" region. County has applied the policy with respect to the Property, however, and with respect to certain other lands in the vicinity of City. In so doing, County has unlawfully delegated its planning and land-use regulatory functions and responsibilities to City, and has unlawfully abrogated its own General Plan and zoning ordinances.

23. BY MINUTE ORDER DATED JUNE 14, 1977, COUNTY REJECTED PLAINTIFF'S APPLICATION FOR SUBDIVISION OF THE PROPERTY AND ADOPTED A FINAL NOTICE OF DETERMINATION AND FINDINGS, DECISIONS AND ORDER ON APPEAL, A TRUE AND CORRECT COPY OF WHICH IS ATTACHED HERETO, MARKED EXHIBIT C AND INCORPORATED HEREIN BY THIS REFERENCE. This Minute Order was adopted after a hearing by the Board of Supervisors of County to consider an earlier Notice of Determination and Findings, Decisions and Order on Appeal, a true and correct copy of which is attached hereto, marked Exhibit D, and incorporated herein by this reference. This Minute Order of June 14, 1977 represents County's final action in the subdivision proceedings herein described. Representatives of City appeared throughout the subdivision proceedings before County and maintained the spurious, unlawful and fraudulent positions above described.

24. IN DENYING PLAINTIFF'S SUBDIVISION APPLICATION, COUNTY DETERMINED THAT THE PROPERTY COULD ONLY BE USED FOR AGRICULTURAL PURPOSES, WHILE ACKNOWLEDGING THAT THE PROPERTY IS AGRICULTURALLY IMPAIRED, AND DENIED TO PLAINTIFF ANY OTHER USE THEREOF NOTWITHSTANDING THAT PLAINTIFF'S SUBDIVISION MAP PROPOSED A USE EXPRESSLY PERMITTED BY COUNTY'S GENERAL PLAN AND ZONING ORDINANCES. In reaching its conclusion County applied the policy of City relegating the land to agricultural uses. Such a land-use designation deprives Plaintiff of the entire economic use of the Property for the sole purpose of appropriating the land to a public, open-space buffer use for the benefit of City, to carry out a deliberate policy in direct derogation of the obligation of City and County to provide for housing to meet regional housing needs.

25. In determining that Plaintiff's land could only be used for agricultural purposes, notwithstanding its general planning and zoning designation for residential use and its suitability therefor, County determined that (i) the Property lacked access by means of suitable public streets, a condition resulting from City's deliberate refusal to permit or approve available access; (ii) the property lacked sanitary sewer service, a condition resulting directly from the wrongful acts of City, County and

District above alleged, (iii) the Property lacked adequate water supply, a finding directly contrary to the fact (in evidence before County) that there are proven sources of supply on the Property and in the vicinity thereof which serve the immediately adjacent residential areas, and (iv) that the Property lacked adequate fire and police services, conditions attributable in part to refusal on part of County and City to provide such services.

26. Under the conditions established by County, City and District which deny access, sanitary sewage disposal, deny the existence of an adequate water supply and refuse, police and fire protection services, none of the beneficial uses enumerated in the Yolo County Code in agricultural areas would be suitable for the Property and provide the Property with a beneficial use, even if the Property was zoned for agricultural use, which it is not. Specifically, the Property is not suited for the uses enumerated in the Yolo County Code for the reasons set forth after each use.

I. YOLO COUNTY CODE, SECTION 8-2.502:

Use Permitted:

"(a) Agriculture, including any customary agricultural buildings and structures, and such uses as, but not limited to, livestock ranges, animal husbandry, field crops, tree crops, nurseries and greenhouses, together with all necessary equipment and facilities for the support and maintenance of the operation, and other agricultural occupations as defined in Section 8-2.208 of Article 2 of this Chapter."

Property Not Suitable For Such Use Because:

(i) no topsoil; (ii) nematode infestation; (iii) proximity of residences precludes aerial pesticide application; (iv) City denies access; (v) City, County and District deny sanitary sewage service; (vi) City and County deny available water service; (vii) City and County deny police and fire protection.

Use Permitted:

"(b) Dwellings, ranch and farm, appurtenant to a principal agricultural use."

Property Not Suited For Such Use Because:

(i) use is ancillary to agricultural use to which the Property is not suited for the reasons set forth above; (ii) City and County deny available water service; (iii) City and County deny required police and fire protection services.

Use Permitted:

"(c) Electrical distribution substations."

Property Not Suitable For Such Use Because:

(i) use is ancillary to an agricultural use to which the Property is not suited for the reasons set forth above; (ii) City and County deny required police and fire protection services.

Use Permitted:

"(d) Hunting clubs, public and private."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny fire and police protection services; (iii) City, County and District deny sanitary disposal; (iv) proximity to residential property renders discharge of firearms unsafe and/or illegal; (v) hunting club is not a beneficial use in an area of close proximity to residences where there is no game—which is the case with respect to the Property.

Use Permitted:

"(e) Oil and gas well drilling and operation."

Property Is Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny fire and police protection services; (iii)

proximity to residential property renders oil and gas well drilling inappropriate on the Property because of the hazards associated therewith and offensive odors emanating therefrom; (iv) surveys and tests disclose no reasonable likelihood that oil and gas deposits are present on the Property.

Use Permitted:

"(f) Parks and recreation areas, public."

Property Is Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City and County deny police and fire protection.

II. YOLO COUNTY CODE, SECTION 8-2.504:

The Property cannot be utilized for any of the uses permitted pursuant to Yolo County Code Section 8-2.504 for the following reasons:

Use Permitted:

"(a) Agricultural, chemicals manufacture and storage."

Property Not Usable For Such Purpose Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) use is hazardous next to residential area.

Use Permitted:

"(b) Agricultural processing plants."

Property Not Suitable For Such Purpose Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(c) Agricultural products storage plants and yards."

Property Is Not Suited For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(d) Airports and landing strips, private."

Property Not Suitable For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) use not acceptable in close proximity to residences and existing El Macero airstrip is being phased out for that reason.

Use Permitted:

"(e) Animal hospitals and sales yards."

Property Not Suitable For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) use not acceptable in close proximity to residences due to odors, noise, etc.

Use Permitted:

"(f) Animal hospitals, veterinary offices and kennels."

Property Not Suitable For This Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City

and County deny police and fire protection; (v) no conceivable market for such use or service close to the facilities at the University of California at Davis.

Use Permitted:

"(g) Buildings and structures, public and quasi-public and uses of an administrative, educational, religious, cultural, or public service type."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(h) Cemeteries, crematories, mausoleums and columbariums."

Property Not Suitable For Such Uses Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(i) Electrical transmission substations, communication equipment buildings and public utility service yards."

Property Not Suitable For Such Uses Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

Use Permitted:

"(j) Fertilizer plants and yards."

Property Not Suitable For Such Uses Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, Coun-

ty and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) proximity to residential area renders this use unfeasible.

Use Permitted:

"(k) Forest products manufacturing and processing plants."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection; (v) proximity to residential area renders this use unfeasible.

Use Permitted:

"(l) Hog farms."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) proximity to residential property; (iii) use generates noxious fumes and odors.

Use Permitted:

"(m) Labor camps."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) proximity to residential property; (iii) City and County deny available water service; (iv) City, County and District deny sanitary sewage service; (v) City and County deny police and fire protection.

Use Permitted:

"(n) Mines, quarries and gravel pits, commercial."

Property Not Suited For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, Coun-

ty and District deny sanitary sewage service; (iv) City and County deny police and fire protection; and (v) use generates noise, dust and traffic incompatible with nearby residential use.

Use Permitted:

"(o) Riding stables."

Property Not Suitable For Such Use Because:

(i) City and County deny access; (ii) City and County deny available water service; (iii) City, County and District deny sanitary sewage service; (iv) City and County deny police and fire protection.

WITHOUT LIMITATION BY THE FOREGOING ENUMERATION, THE CONSTRAINTS IMPOSED BY COUNTY AND CITY ABSOLUTELY PRECLUDE ANY DEVELOPMENT OR BENEFICIAL USE OF THE PROPERTY FOR ANY PURPOSE OF ANY KIND WHATSOEVER. THE WILLFUL AND DELIBERATE NATURE OF COUNTY'S AND CITY'S ACTION DISREGARDING EXISTING GENERAL PLAN DESIGNATIONS AND ZONING TO CARRY OUT THE POLICY OF CITY PRECLUDING DEVELOPMENT OF THE PROPERTY DEMONSTRATES THAT ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE.

27. Plaintiff has exhausted all of its administrative remedies. In view of Government Code § 905.1, no claims need be presented prior to this action as a precondition to the filing or maintenance hereof.

FIRST CAUSE OF ACTION: DECLARATORY RELIEF

28. Plaintiffs repeat as if fully set forth each and every allegation contained in paragraphs 1-27 inclusive hereinabove.

29. Plaintiff contends, and Defendants deny, that restriction of the Property to agricultural use constitutes an abuse of County's and City's police power for the following reasons:

- (a) It deprives the Property of all beneficial use and thus appropriates for a public purpose its entire economic value;
- (b) The decision was undertaken in direct derogation of the general health, safety and welfare County and City are

required to serve in that it carries out an exclusionary housing policy of City contrary to County's own general plan and zoning ordinances, taking actions which adversely affects the supply and distribution of housing within the region in the face of a severe and growing housing shortage; and

(c) In denying Plaintiff's subdivision map, County refused to apply its own general plan and zoning ordinances and instead applied policies enunciated by officers of City, purporting to carry out City policies not properly codified or applicable to the Property, and, in many cases, discriminatory on their face.

(d) Defendants may not apply to Plaintiff any of the policies and practices challenged in this action, which prevent Plaintiff from developing the Property in order to realize the special benefits of the sewer assessments paid by Plaintiffs.

30. Plaintiff further contends, and Defendants deny, that Defendants, and each of them, have intentionally deprived Plaintiffs of any access to the Property which is suitable for residential development, so as to further said Defendants' scheme to appropriate the Property for a public purpose without payment of compensation.

31. An actual controversy which is ripe for declaratory relief exists between the parties in that City and County believe they may lawfully restrict the use of the Property and deprive Plaintiff of access thereto in the manner herein alleged without payment of compensation to Plaintiff; and Plaintiff contends that City's and County's actions imposing restrictions upon Plaintiff's use of the Property and depriving Plaintiff of access thereto are unlawful and constitute an appropriation of the Property for a public purpose in violation of Article 1, Section 19 of the California Constitution, and the 5th and 14th Amendments to the U.S. Constitution.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

SECOND CAUSE OF ACTION: DAMAGES IN INVERSE CONDEMNATION

32. Plaintiffs repeat as if fully set forth each and every allegation contained in paragraphs 1-31 inclusive hereinabove.

33. DENIAL OF PLAINTIFF'S APPLICATION FOR APPROVAL OF A SUBDIVISION MAP, AS HEREINABOVE ALLEGED, REPRESENTS THE CULMINATION AND END PRODUCT OF COUNTY'S AND CITY'S JOINT POLICY, PRESENTLY AND FOR THE FORESEEABLE FUTURE, TO RESTRICT THE PROPERTY TO USES FOR WHICH THE PROPERTY IS NOT SUITED. Imposition of the restrictions mandating such use permanently deprives Plaintiff of the entire economic value and beneficial use of the Property. The restrictions of the Property alleged herein were imposed by City and County for the public purpose of creating an open space area for the use, benefit and enjoyment of City and County. The imposition of such restrictions upon the Property constitutes a damage to or taking of the Property for a public purpose without compensation in violation of Article 1, Section 19 of the Constitution of the State of California and the 5th and 14th Amendments to the U.S. Constitution.

34. The restrictions which have been applied to the Property in this case have purportedly been implemented through the procedures specified in the Subdivision Map Act. In applying the procedures, however, County, acting for itself and for City, carried out a larger policy which became evident when City, County and District acted in concert to amend and redesign the service area of District to exclude the Property. Notwithstanding contrary statements and misrepresentations to the EPA and State Water Board, City, County and District have deliberately excluded the Property from service by public facilities essential thereto since approximately December 1973. Continuation of the restrictions, applied through implementation of uncodified policies, in derogation of County's general plan (and while stating a contrary intent to public officials at the State and federal level) has placed the use of Plaintiff's Property under an unreasonable restriction for an unreasonable period of time. For all practical purposes, the restriction (which wrongfully denies sewer service to the Property) is now permanent.

35. The Property lies within the boundaries of County and outside the boundaries of City. In imposing the restrictions which have deprived the Property of its entire economic value, however, County has acted at the special instance and request of City, applying policies of City which are unreasonable, discriminatory and unlawful on their face. County and City have acted jointly to impose those policies upon the Property and have acted in concert not only in connection with the imposition of land-use restrictions but in their unlawful scheme to deprive Plaintiff of the right to use improvements constructed by or for District notwithstanding that Plaintiff has paid large assessments for use of those improvements on the continuing representation that they would be available for development on the Property. City and County have acted in concert in making misrepresentations to state and federal officials in connection with their attempts to obtain funding to assist in construction of the improvements to be constructed in District. Because of their joint acts in imposing the restrictions upon the Property, which deprives the Property of all economic value, City and County should be held jointly and severally liable for the damages required to be paid to Plaintiff herein in inverse condemnation under Article 1, Section 19 of the California Constitution and the 5th and 14th amendments to the U.S. Constitution.

36. The highest and best use of the Property is for single-family and multiple residential purposes. Plaintiff's proposed subdivision represents a realistic, workable, acceptable and economic implementation of that use in accordance with all applicable laws, ordinances, rules, regulations and prudent development standards.

37. Plaintiff is informed and believes and thereon alleges that the fair market value of the Property at its highest and best use, as above alleged, is One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00). The Property, as presently restricted, has no fair market value.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

**THIRD CAUSE OF ACTION:
DAMAGES FOR DEPRIVATION OF ACCESS**

38. Plaintiff repeats as if fully set forth each and every allegation contained in paragraphs 1-37 inclusive hereinabove.

39. City and County have intentionally deprived Plaintiff of any access to the Property suitable for residential development and have used this artificially-created lack of access as a pretext for denying Plaintiff approval to subdivide and develop the Property.

40. Said deprivation of access constitutes a damage to or taking of the Property for a public purpose without compensation in violation of Article 1, Section 19 of the California Constitution, and the 5th and 14th Amendments to the U.S. Constitution. The exact amount of said damage is presently unknown to Plaintiff who prays leave to amend this complaint when said amount has been ascertained.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

**FOURTH CAUSE OF ACTION:
RECOVERY OF ASSESSMENTS: DUE PROCESS**

41. Plaintiff repeats as if fully set forth each and every allegation contained in paragraphs 1-40 inclusive hereinabove.

42. The assessments paid by Plaintiff to District for the Property were paid upon the basis of official proceedings in which it was determined that the Property would be benefited by construction of sanitary sewer and drainage improvements to serve the Property. The assessments were levied to pay for improvements proposed for the express purpose of facilitating development upon the Property and other lands. Having received the benefit of the assessments for many years in the approximate amount of Seventy-Five Thousand Dollars (\$75,000), or more, City, County and District have now adopted the policy of precluding development upon the Property.

43. In the proceedings described in paragraphs 14 and 15 above, resulting in the formation of District, the imposition of assessments on the Property, and the planning of sewage and drainage facilities to be constructed with assessment funds, Plaintiff and its predecessors in interest were induced to refrain from protests, appeals, or other form of legal challenge to the proceedings by the representations of City, County and District that the Property would be included in the service area and would be permitted to be developed. Plaintiff and its predecessors in interest relied upon these representations, and but for them would not have so refrained from protest. City, County and District breached those representations only after the time had long expired for all usual forms of judicial review of the proceedings.

44. In excluding the Property from the sewage and drainage service as alleged in paragraph 16, City and County acted in furtherance of their police to prevent Plaintiff's beneficial use of the Property. City and County had no valid reason or motivation for the exclusion other than to provide a superficial excuse for denial of residential development upon the Property, as exemplified by County's denial of Plaintiff's subdivision map application, and thereby to effect the taking of the Property for their own benefit as previously alleged.

45. California law provides a mechanism for judicial review of assessment proceedings, contest of assessments and recovery of assessments unlawfully collected. In this instance, however, the assessments were collected at a time when the assessment proceedings expressly contemplated construction of improvements to serve the Property. Now that the improvements have been revised to eliminate such service and development of the Property has been prevented, Plaintiff's cause of action for restitution has arisen for the first time. Defendant's retention of Plaintiff's assessment payments without any opportunity for Plaintiff to obtain judicial review of said Defendants' refusal to permit Plaintiff to realize the special benefits on which they were based deprives Plaintiff of its property without due process of law, in violation of both the United States and California constitutions. Plaintiff is entitled

to have and recover of Defendants the full amount of said assessments, together with interest thereon at the legal rate.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

**FIFTH CAUSE OF ACTION:
RECOVERY OF ASSESSMENTS: CONTRACT**

46. Plaintiff realleges and incorporates herein by reference paragraphs 1-45 above.

47. The proceedings described in paragraphs 14 and 15 above resulted in written contractual obligations among City, County and District of which Plaintiff and its predecessors in interest were intended to be, and were, third party beneficiaries. By the representations alleged in paragraphs 16-18 above, City County and District induced Plaintiff and its predecessors in interest to rely upon those obligations and to change their position in reliance on those obligations, as alleged in paragraphs 42-45 hereinabove. By subsequently excluding the Property from the service area for spurious and unlawful reasons as above alleged, City, County and District breached those obligations to Plaintiff's damage.

WHEREFORE, Plaintiff respectfully requests relief as hereinafter set forth.

**SIXTH CAUSE OF ACTION:
RECOVERY OF ASSESSMENTS: UNJUST
ENRICHMENT**

48. Plaintiff realleges and incorporates herein by reference paragraphs 1-47 above.

49. To permit City, County and District to retain the benefit of assessments collected on such a basis would work a forfeiture against Plaintiff, unjustly enrich City, County and District and exact from Plaintiff the cost of public improvements in substantial excess of any special benefits accruing to Plaintiff.

**SEVENTH CAUSE OF ACTION:
DAMAGES FOR VIOLATION OF CIVIL RIGHTS ACT
OF 1871**

50. Plaintiff realleges and incorporates herein by reference paragraphs 1-49 above.

51. The results of City's and County's actions and zoning regulations is as is more specifically alleged above, to deprive Plaintiffs of any economically viable use of the Property through restrictions on Plaintiffs' use of the Property to agricultural reserve open space, which results in a taking of Plaintiffs Property for public use without just compensation. U.S. Constitution, Amendments 5, 14; 42 U.S.C. §1983.

WHEREFORE, Plaintiff respectfully requests the judgment of this Court:

1. Declaring that City and County's restrictions upon the use of Plaintiff's Property and their deprivation of access to said Property constitute an unlawful damaging and/or taking of the Property for a public purpose without compensation in violation of Article 1, Section 19, of the California Constitution.

2. A declaration that City's and County's policies and practices restricting the use of Plaintiffs' Property may not validly be applied to Plaintiff so as to prevent Plaintiff from developing the Property and realizing the special benefits of the sewer and drainage improvements for which the Property has been assessed.

3. Awarding Plaintiff damages in the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) against City and County, jointly and severally, as compensation for the taking of Plaintiff's Property for a public purpose in violation of Article 1, Section 19 of the California Constitution.

4. Awarding plaintiff damages in the amount shown by proof against City and County, jointly and severally, as compensation for the deprivation of access to plaintiff's property.

5. Ordering City, County, District and Treasurer to repay to Plaintiff all assessments paid to District with respect to the Property for construction of sanitary sewer and drainage improvements, together with interest from the dates of payment at the legal rate.

6. Awarding Plaintiff damages in the amount shown by proof against City and County, jointly and severally, as compensation for the violation of 42 U.S.C. §1983, by the taking of Plaintiffs Property without just compensation.

7. Awarding Plaintiff its costs of suit herein, including a reasonable attorneys' fee.

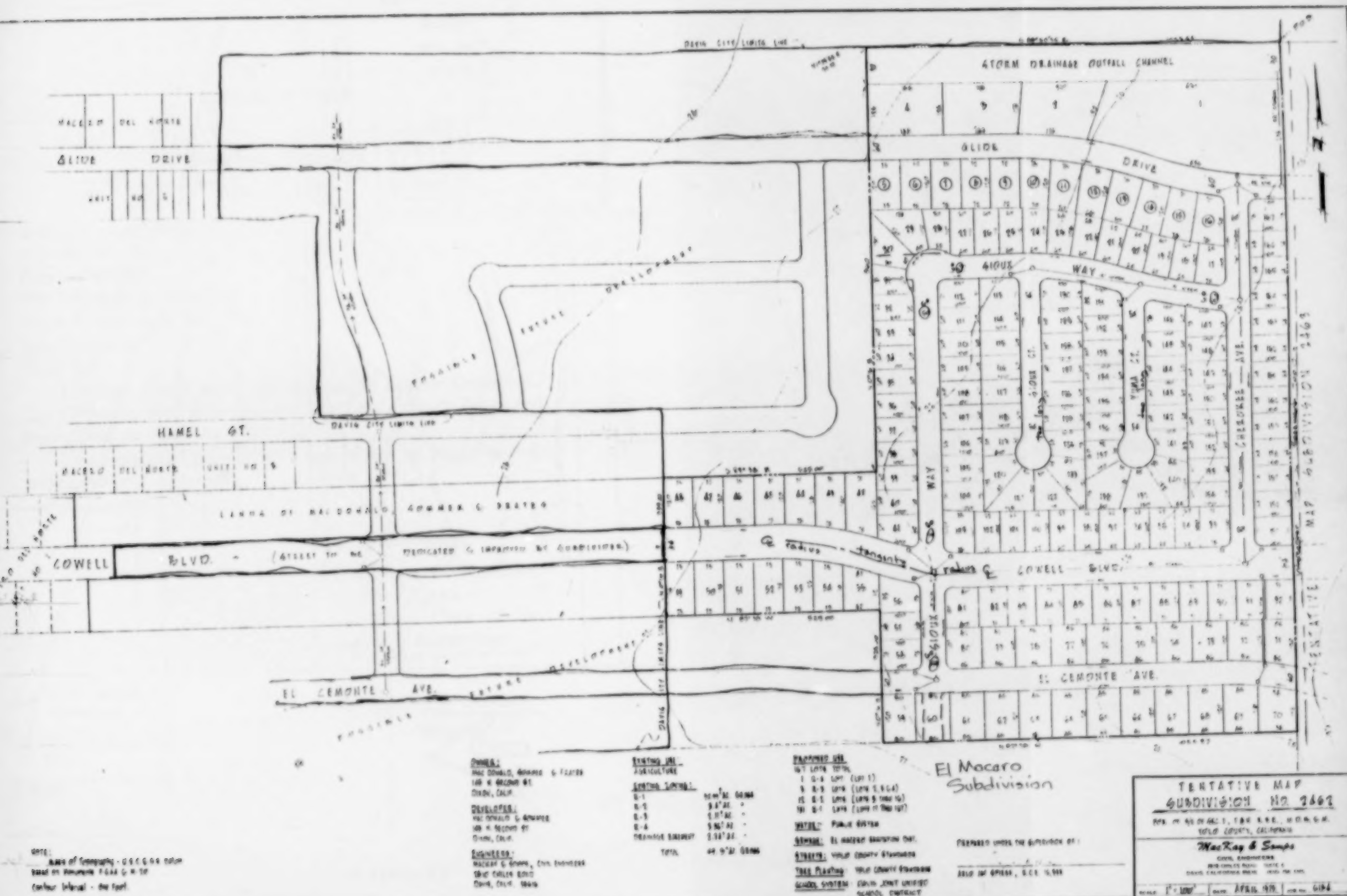
8. Granting Plaintiff such other and further relief as this court deems just and proper.

DATED: October 15, 1981.

/s/

Edward R. MacDonald
Attorney for Plaintiff.

(Verification Omitted in Printing)



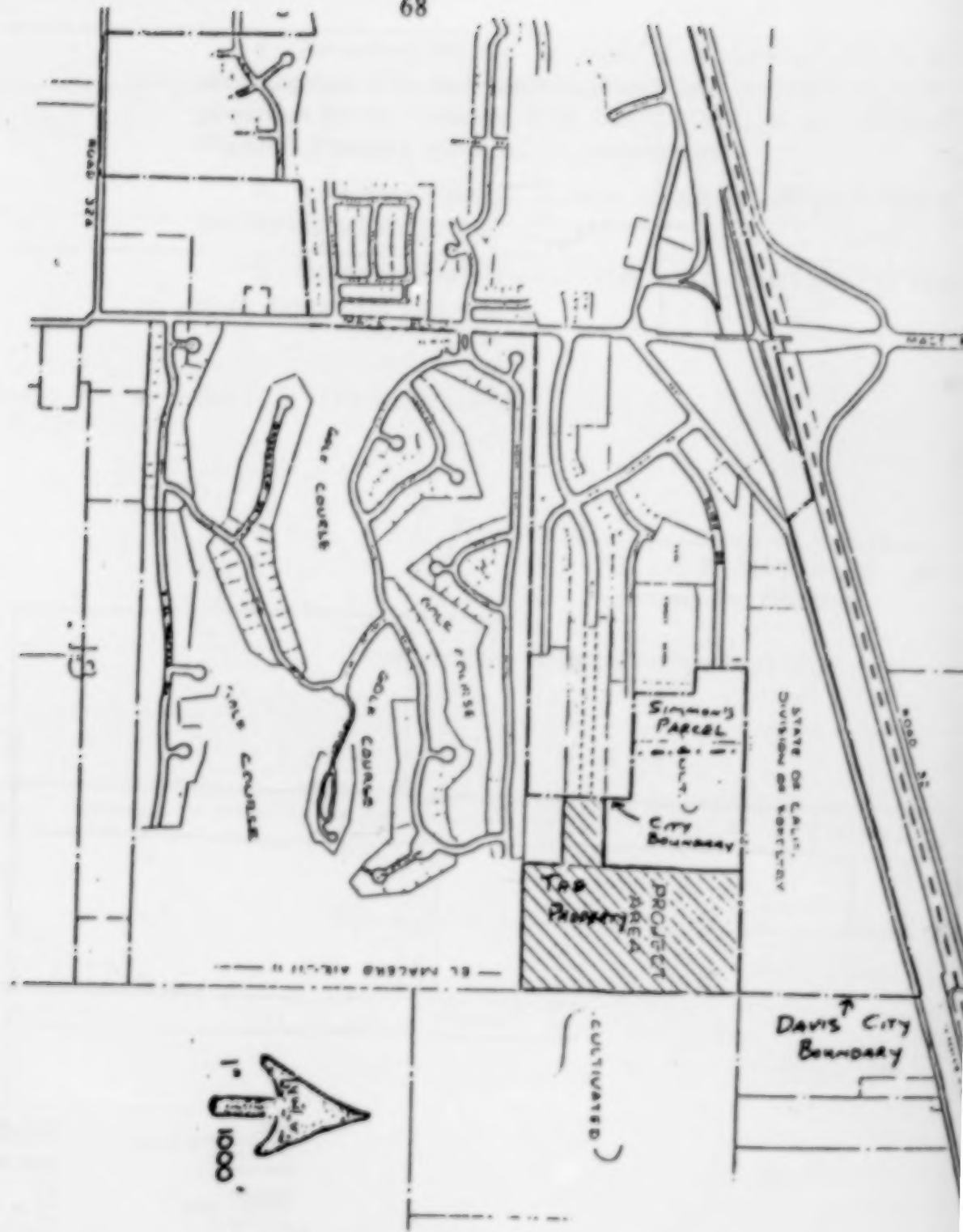


EXHIBIT B

RECEIVED
JUN 21 1977
EP & B

COUNTY OF YOLO

Woodland, California

June 20, 1977

BOARD OF SUPERVISORS
(916) 666-8407

Howard Ellman
One Ecker Bldg. Suite 210
Ecker & Stevenson Sts.
San Francisco, CA 94105

Dear Sir:

Enclosed please find a Xerox Copy of Minute Order No. 77-767 which was approved by the Yolo County Board of Supervisors on June 14, 1977.

Said mentioned copy is being sent to you for your files and information.

Thank you.

Very truly yours,

LAURENCE P. HENIGAN,
COUNTY CLERK
Ex-Officio Clerk of the
Board of Supervisors

By DEBRA E. CONLEY
Deputy

LPH:

Encl.

To:

Auditor
Planning
County Counsel
City of Davis
Gloria McGregor
Howard Ellman
Ed MacDonald

BOARD OF SUPERVISORS
Yolo County, California

Date: June 14, 1977
Entry No. 22

File:

MINUTE ORDER NO. 77-767: ACCEPTED AND ADOPTED THE FINAL NOTICE OF DETERMINATION AND FINDINGS, DECISIONS AND ORDER ON APPEAL, TO BE FILED WITH THE CLERK, IN THE MATTER OF THE APPEAL OF MACDONALD, SOMMER, & FRATES FROM PLANNING COMMISSION DENIAL OF TENTATIVE PARCEL MAP NO. 2462, AND AUTHORIZED THE CHAIRMAN OF THE BOARD OF SUPERVISORS TO SIGN THE DOCUMENT.

Upon motion of Supervisor Marchand, seconded by Supervisor Barton and duly carried, the above Minute Order was so ordered by the following vote:

Ayes: Barton, Marchand, Thompson.

Noes: None.

Absent: Edmonds, Duncan.

FILED

JUN 14 1977

LAURENCE P. HENIGAN, Clerk

By /s/

Deputy

CHARLES R. MACK, COUNTY COUNSEL
ROBERT A. RUNDSTROM, CHIEF DEPUTY COUNTY COUNSEL
C. LEE HUMES, DEPUTY COUNTY COUNSEL
O. H. FIFI ZEFF, DEPUTY COUNTY COUNSEL
RICHARD T. ALCAUSKAS, DEPUTY COUNTY COUNSEL
P.O. Box 127
WOODLAND, CA 95695
TEL. NO. (916) 666-8211

**BEFORE THE BOARD OF SUPERVISORS OF THE
COUNTY OF YOLO, STATE OF CALIFORNIA**

In the Matter of the Appeal of
MACDONALD, SOMMER & FRATES
from Planning Commission Denial
of Tentative Parcel Map No. 2462

**NOTICE OF
DETERMINATION
AND FINDINGS,
DECISIONS AND
ORDER ON APPEAL**

The appeal of the Yolo County Planning Commission's denial of Tentative Parcel Map No. 2462 came regularly before this Board for hearing on Tuesday, February 10th, 1976. Also before this Board on said date was the final environmental impact report submitted on said Subdivision No. 2462.

The following individuals were present at said hearings:

1. Developers-Appellants Arch MacDonald, Ralph S. Sommer and Frank V. Frates, represented by their attorneys, Edward R. MacDonald and Dougal MacDonald.
2. Robert Peterson, Yolo County Planning Director, and Richard King, Assistant Yolo County Planning Direc-

tor, represented by their attorney, C. Lee Humes, Deputy County Counsel.

3. Gloria McGregor, Director of the Davis Community Development Department.

4. Stan Young, representative of the El Macero Community Services District Advisory Committee.

5. All members of the Board of Supervisors were present throughout said hearing, and were advised by Charles R. Mack, County Counsel.

During said hearing, the Board of Supervisors received written and documentary evidence, exhibits, and heard oral arguments. The cause was submitted to this Board for decision, and this Board hereby makes the following Findings of Fact, Decision and Orders:

FINDINGS OF FACT

I. *Environmental Impact Report*

A. The final Environmental Impact Report on proposed Subdivision No. 2462 was submitted to this Board. The Board finds and certifies that said final EIR has been prepared by the Yolo County Planning Department in accord with the California Environmental Quality Act, Guidelines adopted pursuant thereto, and the Yolo County Code and that it has reviewed and considered the information contained therein.

B. The Board finds that the proposed project has a significant effect on the environment.

C. The Board finds that the proposed project has the following significant adverse impacts upon the environment:

1) The summary of impacts and their disposition delineated in said final environmental impact report at pages 38-40 are hereby found by this Board to be an accurate and proper appraisal of the significant adverse environmental impacts of the proposed project. Said summary is incorporated herein by this reference as though set forth here in full.

II. *Appeal of Denial of Tentative Map*

A. This Board hereby finds that the proposed Subdivision, together with the provisions for its design and improvement shown in Tentative Subdivision Map No. 2462 are not consistent with the General Plan of the County of Yolo, nor with the specific plan of the County of Yolo embodied in the Zoning Regulations of the County, for the following reasons, which are hereby adopted as Findings by this Board:

1) The Yolo County General Plan requires and states as an object of the Plan that development in the County shall be sound and orderly, and shall occur based on an economic base related to human resources, soil, water, drainage, topography and potentials for services such as sewerage and transportation. The General Plan requires that the spread of development shall be controlled to provide for efficient services to developments by community facilities and utilities, and to prevent the piecemeal development of subdivisions within agricultural zones which results in the impossibility of economically farming the remaining parcels.

2) The Zoning Ordinance of the County of Yolo is a specific plan within the meaning of Article 8 of Chapter 3 of Division 1 of the Government code, commencing with § 65450, and is declared to be so by Yolo County Code § 8-2.102. Said specific plan also requires sound and orderly development as aforesaid, by virtue of § 8-2.104. The Yolo County Land Development Ordinance in § 8-1.102 states its purpose to be the effectuating of the objectives established for development in the County by the General Plan, and requires that adequate provision for ingress and egress be made in every subdivision approved pursuant to said Ordinance.

3) The closest developed property westerly of the proposed subdivision is approximately one-quarter of a mile to the west of the closest proposed boundary on the subject subdivision. The intervening 56 acres presently is under cultivation. The proposed subdivision would render cultivation of the intervening 56 acres economically unfea-

sible because said cultivation would result in dust, pesticides, and crop dusting operations becoming a nuisance to the residents of the proposed subdivision.

4) The site of the proposed subdivision is located within an area of prime agricultural land. The character of the soil on the site has been impaired by its sale to the State of California under threat of condemnation.

5) The only access to the proposed subdivision presented in said Tentative Map is by way of the proposed extension of Cowell Boulevard from its present terminus to the westernmost boundary of the proposed subdivision. This land currently is within the city limits of the City of Davis, and is owned by the appellants.

6) The City of Davis reported to this Board that it would refuse to accept dedication of the proposed extension of Cowell Boulevard, and would refuse to enter into an agreement with either Yolo County or any existing or proposed special district to allow maintenance by said district of Cowell Boulevard within the Davis City limits. The City of Davis further reported to this Board that it would resist the development of the proposed extension of Cowell Boulevard as a private street. This evidence was unrefuted in the hearing. Therefore, this Board finds that the subdivision and its design and improvements as proposed do not provide for access to the subdivision by a public street. Until such public street is constructed and accepted by a governmental entity capable of maintaining it, the Board finds that the subdivision would be served only by a private road, with no means for maintenance by a public entity of said road.

7) Yolo County Code § 8-1.702(b) requires each parcel in a subdivision to be served by a public street. The Board finds that the Map as submitted does not provide for service to each parcel by a public street, because the proposed map does not provide for the dedication to and acceptance by any governmental entity of the only access route which consists of the proposed extension of Cowell Boulevard.

8) Yolo County Code § 8-1.102(d) requires that each subdivision make provision for adequate means of ingress and egress to the subdivision. The Board finds that the proposed private development of Cowell Boulevard as a private road does not provide adequate means of egress and access to the proposed subdivision.

9) The Board finds that the Tentative Map as presented does not provide for sewer service by any governmental entity. The proposed sewer service will be provided by the El Macero Interceptor Sewer Line, which is located on the easternmost boundary of the proposed subdivision. Yolo County Agreement No. 75-97 requires that before any new connection to the said El Macero sewer line may be approved by the County, the area served by the connection must either be in the existing El Macero County Service Area, within the City of Davis, or must annex to the El Macero County Service Area. The proposed development is not within the City of Davis and is not within the existing El Macero County Service Area.

10) The City of Davis has officially opposed the subdivision because it is inconsistent with the General Plan.

11) The only means for provision of sewer services by the El Macero interceptor sewer require that the proposed subdivision annex to the existing Community Services Area. Said annexation is subject to Local Agency Formation Commission jurisdiction. The Board finds that no proceedings currently are pending before LAFCO for the annexation of the proposed subdivision. If the proposed subdivision is annexed to the El Macero County Service Area, sewer service will be provided by the El Macero interceptor sewer upon the payment of the fees required by Contract No. 75-97, if any.

12) The Board finds that the general policy within the Yolo General Plan of sound and orderly development requires that governmental services required by a subdivision located contiguous to a city should be provided by that city rather than by a special district or combination of

special districts, and takes official notice of the fact that the Yolo County Local Agency Formation Commission has adopted this policy.

13) The proposed subdivision would require the level of police protection required by any residential subdivision. The Yolo County Sheriff's Department has jurisdiction on the proposed site. The level of protection capable of being afforded to the proposed site by the Sheriff's Department is not intense enough to meet the needs of the proposed subdivision.

14) There is no provision made in the proposed subdivision for the provision of water or maintenance of a water system for the subdivision by any governmental entity. The only provision for water service proposed in the map is by a private water company. The Board finds that wells located on or near the proposed site have sufficient capacity to provide said water.

15) The proposed map makes no provision for the maintenance, lighting, and cleaning of the streets within the subdivision to be dedicated to the public, nor of Cowell Boulevard. Maintenance, lighting, and cleaning of said streets could only be provided by an existing special district or a new special district. The multiplication of special districts in the area of the proposed subdivision violates the Yolo County General Plan's mandate of sound and orderly growth.

16) The proposed subdivision makes no provision for parks or recreation facilities.

17) Provision and maintenance of parks and recreation facilities within the proposed subdivision could be accomplished only by a special district. The proposed subdivision is not located within a special district capable of providing said services.

18) The residents of the proposed subdivision will avail themselves of the park and recreation facilities located in the City of Davis, but will pay no taxes or use charges to offset the cost of maintenance of the park and recreation facilities located in the City of Davis.

B. The Board finds that the proposed site is not physically suitable for the type of development for the following reasons which are hereby adopted as findings:

1. The Board finds that the site proposed for the subject tentative map is not presently served either by the City or by the El Macero County Service Area or any other special district with the governmental services required for the provision or maintenance of essential services on the site. No provisions is made within the Tentative Map for the provision of sewer, water, street maintenance, street lighting, parks, recreation, and police services by any public entity.

C. The Board finds that the design of the proposed subdivision and the type of improvement is likely to cause serious public health problems, for the following reasons, which are hereby adopted as findings:

1. Access to the subdivision is by means of the proposed extension of Cowell Boulevard for a distance of 1300 feet, more or less. The map presented makes no provision for any other means of access to the subdivision. The Board finds that the construction of a subdivision only with one 1300-foot long access route constitutes a real and substantial danger to the public health in the event of fire, earthquake, flood, or other natural disaster, and could render said subdivision inaccessible in said event.

D. The Board finds that the proposed subdivision violates the Yolo County Land Development Ordinance for the following reasons, which are hereby adopted as findings:

1. The proposed subdivision violates the orderly growth concept in the Yolo County General Plan.

2. The Yolo County Land Development Ordinance requires effectuation of the Yolo County General Plan by every development authorized pursuant to the Ordinance. The Ordinance requires that adequate means of egress and ingress be provided for every subdivision, and that every parcel within the subdivision be served by a public street.

3. The Board finds that these requirements are not met because no provision for access by a public street is made by the Tentative Map as submitted.

E. The Board finds that there has been no showing of the community needs for the proposed subdivision for the following reasons which are hereby adopted as findings:

1. Yolo County Code § 8-1.804 requires the affirmative showing of satisfaction of community needs for the proposed subdivision.

2. Because the proposed subdivision provides no means for provision of the governmental services essential for a residential subdivision, the community needs would not be served by this proposed subdivision.

3. The residents of this proposed subdivision would of necessity look to the City of Davis and the El Macero County Service Area for provision of transportation, recreation and park facilities. The residents of the City of Davis and the El Macero County Service Area consequently would be taxed for provision and maintenance of the services to the residents of the subdivision, located outside the limits of those entities.

F. The Board finds that no representations or promises were made to the Appellant by any County officer, agent or employee that a subdivision would be approved on the subject site, for the following reasons, which are hereby adopted as Findings:

1. Appellant alleged that the developers were told by an employee of the City of Davis that they would be able to develop the subject site as a subdivision upon completion of the El Macero interceptor line.

2. The Board finds that no officer, agent or employee of Yolo County represented to the Appellants or any other person that the County would approve a subdivision on the existing area.

3. The Board finds that the owners of the subject parcel are entitled to sewer service by the El Macero

interceptor sewer for any legal use on the subject site, upon the annexation of the site to either the City of Davis or the El Macero County Service Area, and upon the reimbursement of necessary facilities expansion costs, if any, pursuant to Yolo County Contract No. 75-97.

4. The Board finds that this entitlement to sewer service does not constitute an entitlement to construct a subdivision in violation of the Subdivision Map Act or the Yolo County Code, or inconsistent with the general or specific plans for the area. The Board further finds that no representations were made by any officer, agent, or employee of the County that the entitlement to sewer service would result in an entitlement to a subdivision on the subject site.

CONCLUSIONS AND DECISIONS

1. The proposed subdivision, together with the provisions for design and improvement, is inconsistent with the General Plan of the County of Yolo.

2. The proposed subdivision, together with the provisions for its design and improvement, is inconsistent with the specific plan of the County of Yolo set forth in the Zoning Regulations.

3. The site of the proposed subdivision is not physically suitable for the type of development.

4. The design of the subdivision and the type of improvement proposed are likely to cause serious public health problems.

5. The proposed subdivision violates the Land Development Ordinance of the County of Yolo.

6. There has been no showing of community needs for the proposed subdivision, as required by the Land Development Ordinance of the County.

7. The County is not estopped to apply the Subdivision Map Act, the Land Development Ordinance, the General Plan, or the specific plans for the area to the instant case.

ORDER

The Board of Supervisors of the County of Yolo, for the above stated reasons, and based upon the findings delineated hereinabove, hereby makes the following orders:

1. The final Environmental Impact Report submitted on the proposed subdivision hereby is adopted, and the Clerk of the Board is directed to file a Notice of Determination that the environmental impact report has been adopted pursuant to the California Environmental Quality Act, and show that the development will result in substantial adverse effect to the environment.

2. The findings of the Yolo County Planning Commission, its decision and its orders denying Tentative Parcel Map No. 2462 hereby are sustained and adopted.

4. The appeal on the decision of the Yolo County Planning Commission on Tentative Map No. 2462 hereby is dismissed.

PASSED AND ADOPTED by the Board of Supervisors
this _____ day of _____, 1977, by the following vote:

AYES:

NOES:

ABSENT:

CHAIRMAN OF THE BOARD
OF SUPERVISORS COUNTY
OF YOLO,
STATE OF CALIFORNIA

ATTEST:

LAURENCE P. HENIGAN, CLERK

BY /s/

DEPUTY

(SEAL)

(EXHIBIT D OMITTED IN PRINTING)

**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

**NOTICE OF HEARING ON DEMURRER
TO FOURTH AMENDED COMPLAINT**

(Title Omitted in Printing)

TO: PLAINTIFFS ABOVE NAMED AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that the demurrer of defendant CITY OF DAVIS to plaintiffs' Fourth Amended Complaint will be heard in Department 3 of the above entitled Court, located at the Yolo County Courthouse, Woodland, California on December 18, 1981, at 9:00 a.m., or as soon thereafter as the matter can be heard.

The grounds for the demurrer are described in the Demurrer of the City of Davis to the Fourth Amended Complaint.

Said demurrer will be based upon this notice, the demurrer itself, the points and authorities submitted in support of demurrer, those matters which have been judicially noticed pursuant to the request for taking of judicial notice heretofore served and filed; and the pleadings, papers and records on file herein as well as such other and further oral and documentary evidence as may be submitted on and before the hearing on this demurrer.

DATED: December 3, 1981.

P. LAWRENCE KLOSE, ESQ.

McDONOUGH, HOLLAND & ALLEN
A Professional Corporation

By /s/ C. R. BROWN

for William L. Owen
Attorneys for Defendant
CITY OF DAVIS

**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

**DEMURRER OF THE CITY OF DAVIS
TO FOURTH AMENDED COMPLAINT**

(Title Omitted in Printing)

Defendant CITY OF DAVIS demurs to each of the causes of action alleged in the Fourth Amended Complaint of MacDONALD, SOMMER & FRATES, a joint venture, on each of the following grounds:

FIRST CAUSE OF ACTION

1. The First Cause of Action is uncertain.
2. The First Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.
3. The First Cause of Action does not state facts sufficient to constitute a cause of action.

SECOND CAUSE OF ACTION

1. The Second Cause of Action is uncertain.
2. The Second Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.
3. The Second Cause of Action does not state facts sufficient to constitute a cause of action.

THIRD CAUSE OF ACTION

1. The Third Cause of Action is uncertain.
2. The Third Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.
3. The Third Cause of Action fails to state facts sufficient to constitute a cause of action.

FOURTH CAUSE OF ACTION

1. The Fourth Cause of Action is uncertain.
2. The Fourth Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative remedies.
3. The Fourth Cause of Action does not state facts sufficient to constitute a cause of action.
4. The Fourth Cause of Action does not state facts sufficient to constitute a cause of action in that: (1) plaintiffs failed to allege that due presentment of a claim (Government Code sections 905, *et seq.*); and (2) the action is barred by the applicable statutes of limitation, to wit: Code of Civil Procedure section 339(1).
5. The Fourth Cause of Action is founded upon a contract and it cannot be ascertained from the pleading whether the contract is written or oral.

FIFTH CAUSE OF ACTION

1. The Fifth Cause of Action is uncertain.
2. The Fifth Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative remedies.
3. The Fifth Cause of Action does not state facts sufficient to constitute a cause of action.

4. The Fifth Cause of Action does not state facts sufficient to constitute a cause of action in that: (1) plaintiffs failed to allege that due presentment of a claim (Government Code sections 905, *et seq.*); and (2) the action is barred by the applicable statutes of limitation, to wit: Code of Civil Procedure section 339(1).

5. The Fifth Cause of Action is founded upon a contract and it cannot be ascertained from the pleading whether the contract is written or oral.

SIXTH CAUSE OF ACTION

1. The Sixth Cause of Action is uncertain.
2. The Sixth Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative remedies.
3. The Sixth Cause of Action does not state facts sufficient to constitute a cause of action.
4. The Sixth Cause of Action does not state facts sufficient to constitute a cause of action in that: (1) plaintiffs failed to allege that due presentment of a claim (Government Code sections 905, *et seq.*); and (2) the action is barred by the applicable statutes of limitation, to wit: Code of Civil Procedure section 339(1).
5. The Sixth Cause of Action is founded upon a contract and it cannot be ascertained from the pleading whether the contract is written or oral.

SEVENTH CAUSE OF ACTION

1. The Seventh Cause of Action is uncertain.
2. The Seventh Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.
3. The Seventh Cause of Action does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant the CITY OF DAVIS prays that the demurrer be sustained without leave to amend; that defendant have judgment against plaintiffs for costs of suit herein; and for such other and further relief as the Court may deem just and proper.

DATED: December 3, 1981.

P. LAWRENCE KLOSE, ESQ.
MCDONOUGH, HOLLAND &
ALLEN
A Professional Corporation

By C. R. BROWN
for William L. Owen
Attorneys for Defendant
CITY OF DAVIS

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO

DEMURRER TO FOURTH AMENDED COMPLAINT

(Caption Omitted in Printing)

Defendant, COUNTY OF YOLO, demurs to each of the causes of action alleged in the Fourth Amended Complaint of the plaintiff, MacDONALD, SOMMER & FRATES, a joint venture, on each of the following grounds:

FIRST CAUSE OF ACTION

1. The First Cause of Action is uncertain in that:
 - (a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;
 - (b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.
2. The First Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.
3. The Board of Supervisors denial or rejection of plaintiff's application for subdivision of the property is *res judicata*, and that finding is not subject to collateral attack in the Superior Court.
4. The First Cause of Action does not state facts sufficient to constitute a cause of action.

SECOND CAUSE OF ACTION

1. The Second Cause of Action is uncertain in that:
 - (a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;
 - (b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.
2. The Second Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.
3. The Board of Supervisors denial or rejection of plaintiff's application for subdivision of the property is *res judicata*, and that finding is not subject to collateral attack in the Superior Court.
4. The Second Cause of Action does not state facts sufficient to constitute a cause of action.
5. Government Code Section 818.4 immunizes defendant, COUNTY OF YOLO, from liability to pay damages resulting from denial of plaintiff's tentative map.
6. So far as the Second Cause of Action claims damages resulting from legislative enactments, Government Code Section 818.2 immunizes defendant, COUNTY OF YOLO, from liability to pay damages for "adopting or failing to adopt an enactment."

THIRD CAUSE OF ACTION

1. The Third Cause of Action is uncertain in that:
 - (a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;
 - (b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.
2. The Third Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.

3. The Board of Supervisors denial or rejection of plaintiff's application for subdivision of the property is *res judicata*, and that finding is not subject to collateral attack in the Superior Court.

4. The Third Cause of Action fails to state facts sufficient to constitute a cause of action.

5. The Third Cause of Action fails to state facts sufficient to constitute a cause of action for the following reasons:

(a) Plaintiff fails to allege due presentment of a claim within the time prescribed by Government Code Section 911.2;

(b) Plaintiff fails to allege the occurrence of those events specified in Government Code Section 945.4 which is a prerequisite to any suit for money or damages against the COUNTY OF YOLO;

(c) Government Code Section 818.4 immunizes defendant, COUNTY OF YOLO, from liability to pay damages resulting from the denial of plaintiff's tentative map;

(d) Government Code Section 818.2 immunizes the defendant, COUNTY OF YOLO, from liability to pay damages for "adopting or failing to adopt an enactment."

FOURTH CAUSE OF ACTION

1. The Fourth Cause of Action is uncertain in that:
 - (a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;
 - (b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.
2. The Fourth Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court.
3. The Fourth Cause of Action does not state facts sufficient to constitute a cause of action.

4. The Fourth Cause of Action is founded upon a contract and it cannot be ascertained from the pleading whether the contract is written or oral.

5. The Fourth Cause of Action does not state facts sufficient to constitute a cause of action in that:

(a) Plaintiff fails to allege due presentment of a claim within the time prescribed by the Government Code Section 911.2;

(b) Plaintiff fails to allege the occurrence of those events specified in Government Code Section 945.4 which are a prerequisite to any suit for money or damages against the County of Yolo;

(c) The action is barred by the applicable statutes of limitation, i.e. Code of Civil Procedure Section 339(1);

(d) Government Code Section 818.2 immunizes defendant, COUNTY OF YOLO, from liability to pay damages "adopting or failing to adopt an enactment."

(e) Government Code Section 818.4 immunizes defendant, COUNTY OF YOLO, from liability to pay damages resulting from the denial of plaintiff's tentative map.

FIFTH CAUSE OF ACTION

1. The Fifth Cause of Action is uncertain in that:

(a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;

(b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.

2. The Fifth Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.

3. The Board of Supervisors denial or rejection of plaintiff's application for subdivision of the property is *res judicata*, and that finding is not subject to collateral attack in the Superior Court.

4. The Fifth Cause of Action is founded upon a contract and it cannot be ascertained from the pleading whether the contract is written or oral.

5. The Fifth Cause of Action does not state facts sufficient to constitute a cause of action.

6. The Fifth Cause of Action does not state facts sufficient to constitute a cause of action in that:

(a) Plaintiff fails to allege due presentment of a claim within the time prescribed by the Government Code Section 911.2;

(b) Plaintiff fails to allege the occurrence of those events specified in Government Code Section 945.4 which are a prerequisite to any suit for money or damages against the County of Yolo;

(c) The action is barred by the applicable statutes of limitation, i.e. Code of Civil Procedure Section 339(1);

(d) Government Code Section 818.2 immunizes defendant, COUNTY OF YOLO, from liability to pay damages "adopting or failing to adopt an enactment."

(e) Government Code Section 818.4 immunizes defendant COUNTY OF YOLO, from liability to pay damages resulting from denial of plaintiff's tentative map.

SIXTH CAUSE OF ACTION

1. The Sixth Cause of Action is uncertain in that:

(a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;

(b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.

2. The Sixth Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.

3. The Board of Supervisors denial or rejection of plaintiff's application for subdivision of the property is *res judicata*, and that finding is not subject to collateral attack in the Superior Court.

4. The Sixth Cause of Action is founded upon a contract and it cannot be ascertained from the pleading whether the contract is oral or written.

5. The Sixth Cause of Action does not state facts sufficient to constitute a cause of action.

6. The Sixth Cause of Action does not state facts sufficient to constitute a cause of action in that:

(a) Plaintiff fails to allege due presentment of a claim within the time prescribed by the Government Code Section 911.2;

(b) Plaintiff fails to allege the occurrence of those events specified in Government Code Section 945.4 which are a prerequisite to any suit for money or damages against the County of Yolo;

(c) The action is barred by the applicable statutes of limitation, i.e. Code of Civil Procedure Section 339(1);

(d) Government Code Section 818.2 immunizes defendant, COUNTY OF YOLO, from liability to pay damages "adopting or failing to adopt an enactment."

(e) Government Code Section 818.4 immunizes defendant, COUNTY OF YOLO, from liability to pay damages resulting from the denial of plaintiff's tentative map.

SEVENTH CAUSE OF ACTION

1. The Seventh Cause of Action is uncertain in that:

(a) It incorporates by reference other allegations but fails to specify which of the acts alleged in the incorporated allegations ground the Cause of Action alleged;

(b) It cannot be determined if plaintiff is including allegations of civil conspiracy in its cause of action.

2. The Seventh Cause of Action fails to state facts sufficient to show the subject matter jurisdiction of this Court in that plaintiffs have failed to exhaust their administrative and judicial remedies.

3. The Board of Supervisors denial or rejection of plaintiff's application for subdivision of the property is *res judicata*, and that finding is not subject to collateral attack in the Superior Court.

4. The Seventh Cause of Action does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant, COUNTY OF YOLO, prays that its Demurrer to the Fourth Amended Complaint be sustained without leave to amend; that defendant have judgment against plaintiff for costs of suit herein, and for such other and further relief as the court may deem just and proper.

DATED: January 19, 1982

McDONALD, SAELTZER, MORRIS
& CAULFIELD

By /s/ EUGENE W. SAELTZER

EUGENE W. SAELTZER
Attorneys for Defendant
COUNTY OF YOLO

**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

**NOTICE OF HEARING ON DEMURRER
TO FOURTH AMENDED COMPLAINT**

(Title Omitted in Printing)

**TO: PLAINTIFFS ABOVE NAMED AND TO THEIR
ATTORNEYS OF RECORD:**

NOTICE IS HEREBY GIVEN that the Demurrer of the defendant COUNTY OF YOLO to plaintiffs' Fourth Amended Complaint be heard in Department 3 of the above-entitled court, located at the Yolo County Courthouse, Woodland, California on March 15, 1982, at 1:30 p.m. or as soon thereafter as the matter can be heard.

The grounds for the Demurrer are described in the Demurrer of the County of Yolo to the Fourth Amended Complaint.

Said Demurrer will be based upon this notice, the Demurrer itself, the Points and Authorities submitted in support of the Demurrer, the Points and Authorities submitted by the CITY OF DAVIS, those matters which have been judicially noticed pursuant to the request for taking of judicial notice heretofor served and filed by defendants COUNTY OF YOLO and CITY OF DAVIS, and the pleadings, papers and records on file herein as well as such other and further oral and documentary evidence as may be submitted on and before the hearing on this Demurrer.

DATED: January 19, 1982.

MCDONALD, SAELTZER, MORRIS
& CAULFIELD

By: /s/

EUGENE W. SAELTZER
Attorneys for Defendant
COUNTY OF YOLO

**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

**NOTICE OF REQUEST AND REQUEST
FOR TAKING JUDICIAL NOTICE**

(Title Omitted in Printing)

**TO: DEFENDANTS ABOVE NAMED AND TO THEIR
ATTORNEYS OF RECORD:**

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on May 24, 1982, at 1:30 p.m. or as soon thereafter as the matter can be heard in the law and motion department (Department Three) of the above-entitled Court, Yolo County Courthouse, Woodland, California, the Plaintiff will request this Court to take judicial notice of the following items, to-wit:

1. All records, files, exhibits and proceedings in this action, No. 36655 and 36657. Said records are in the possession of this Court.

2. All transcripts of hearings before the Yolo County Board of Supervisors relating to TM-2462, which hearings were at the Yolo County Board of Supervisors Chambers in Woodland, California, on February 10, 1976, *et seq* and appeal related thereto held on April 18, 1977. Said transcripts are contained in the Court's file in Exhibit E of Action No. 36657, a copy of which Exhibit E was served on Defendant Counsel.

3. The Notice of Determination and Findings and Decisions and Order on Appeal before the Yolo County Board of Supervisors for tentative map 2462, the subject property filed June 14, 1977, by the Clerk of Yolo County, California (Exhibit C to the Fourth Amended Complaint.)

4. Joint Powers Agreement Re: Sewer Service between County and City re: provision of Sewer Service to properties within the Sewer Service area, dated January 24, 1974, which agreement excluded the subject property from

Sewer Service by area and population, agreement #74-214 attached to this request as Exhibit A and incorporated herein.

5. Joint Powers Agreement amended version of 74-214 which Agreement now provides for Sewer Service to the subject property, dated April 7, 1975, and attached to the Declaration of Edward R. MacDonald in Opposition to Motion for Summary Judgment as Exhibit A and incorporated herein.

6. United States Clean Water Grant Law, codified as 33 USC 1151, *et seq.* United States Regulations, promulgated by the E.P.A. and codified as 40 CFR 3.100 *et seq.*, 35.800 *et seq.*, 35.900 *et seq.*, and 35.1000 *et seq.* (6a) Letter of April 19, 1977, from Yolo County Planning Director, Robert Peterson to Plaintiff, denying processing of tentative map 2463, being the 108 acres due east of the subject property attached hereto as Exhibit A-1.

7. Records of Yolo County Assessors Office identified as Rural Property Appraisal Record for the subject property identified further as Parcel 33-290-56, 33-240-20, and 33-240-23, attached to this request as Exhibits B, C, and D respectively and incorporated herein.

8. Picture taken by Cartwright Aerial Photographers including the subject property and adjacent area dated August 10, 1981, said picture is attached to the Declaration of Don Johnson in opposition to Motion for Summary Judgment as Exhibit A and incorporated herein.

9. Appraisal by G. W. Shaeffer for the County of Yolo re condemnation, dated March 20, 1975, and filed with the Yolo County Clerk on March 21, 1975 which is attached to the Supplemental Declaration of Edward R. MacDonald in Opposition to Summary Judgment and is incorporated herein.

10. Approval of the Simmons Parcel for development adjacent to the subject property by letter dated May 24, 1977, signed by Gloria Shepard McGregor, Community Development Director attached to this request as Exhibit E and incorporated herein.

11. All Yolo County General Plans in effect in 1973 and during the pendency of this action and zoning ordinances.

12. Housing allocation report dated 1976 attached to this request as Exhibit E-1 and incorporated herein.

13. All City of Davis General Plans and Zoning Ordinances in effect in 1973 and during the pendency of this action.

14. Deeds of street access to the subject property identified as Exhibits F, G, H, and I attached to this request and incorporated herein.

15. Section 54773 *et seq.* of the Government Code of California.

16. Letter of demand by Plaintiffs to the El Macero Sewer Assessment District that said District provide guarantees of access of the subject property to sewage facilities, Exhibit J and attached to this request and incorporated herein.

17. Index of Exhibits re tentative map 2462 as accepted into evidence by the Yolo County Board of Supervisors February 10, 1976, in a hearing on appeal of denial of tentative map 2462, on page 34 of transcript of said hearing. A true copy of said Index of Exhibits is attached to this request hereto and incorporated as Exhibit K.

18. Site Plan tentative map No. 2463 attached to this request as Exhibit L and incorporated herein.

19. Minutes of the Meeting of the City Council, dated January 29, 1974, attached to this request as Exhibit M and incorporated herein.

20. Minute Order No. 74-154 of the Yolo County Board of Supervisors, dated February 4, 1974, reducing the size of the sewer interceptor pipe from 24 inches to 21 inches at the request of the City of Davis, a true copy attached to this request hereto and incorporated as Exhibit N herein.

21. Letter re housing allocation proposal to Plaintiffs from Gloria Shepard McGregor, Community Development Director of the City of Davis attached to this request hereto and incorporated herein as Exhibit O.

22. Minutes of the City Council dated December 17, 1975, wherein the Council allocates no units for MacDonald's land based upon, in part, "the proposal violates the General Plan in that it calls for a major street which would dead end into an area planned for agricultural uses" which minutes are contained in Exhibit HA-7 of Exhibit K referenced in Paragraph 17 above.

23. Letter dated August 29, 1975, by Gloria Shepard McGregor and E. Danny Figueroa requiring that Cowell Boulevard be cul-de-saced or curved southward to connect with El Cemente Avenue as condition of approval of housing allocation for 33 lots owned by Plaintiff between the subject property and improved Cowell Boulevard in the City of Davis. Said letter is contained in Exhibit HA-2 of Exhibit K.

The propriety of these requests for judicial notice is discussed in Plaintiffs' Points and Authorities in support of Request for the Taking of Judicial Notice filed concurrently herewith.

DATED: May 14, 1982, in Dixon, California.

Respectfully submitted,

/s/

EDWARD R. MACDONALD
Attorney for Plaintiffs

**SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO**

MACDONALD, SOMMER & FRATES,
a Joint Venture,

Plaintiff,

vs.

COUNTY OF YOLO, a political sub-
division of the State of California;
CITY OF DAVIS, a municipal corporation;
EL MACERO SEWER EASEMENT
DISTRICT, an agency of
the County of Yolo; JOHN L.
DAHLER, as Treasurer of the
County of Yolo,

Defendants.

NO. 36655

**RULINGS ON
DEMURRER
TO FOURTH
AMENDED
COMPLAINT**

The Demurrer to the Fourth Amended Complaint in the above cause came on regularly for hearing before Department III of the court and subsequent submission on June 10, 1982. Judge HARRY A. ACKLEY presided. Plaintiff was represented by its counsel of record with attorney EDWARD R. MACDONALD appearing. The demurring defendant COUNTY OF YOLO was represented by its counsel of record with attorney RICHARD W. SHERWOOD appearing. The demurring defendant CITY OF DAVIS was represented by its counsel of record with attorney WILLIAM L. OWEN and City Attorney P. LAWRENCE KLOSE appearing. The court having received the points and authorities together with supporting documents, having heard the oral arguments of counsel, and the matter having been submitted for decision now makes its ruling on the Demurrer to the Fourth Amended Complaint.

I. BACKGROUND:

Plaintiff is a joint venture. On January 25, 1982 plaintiff filed its Fourth Amended Complaint. Various amendments to plaintiff's complaint occurred after the court earlier sustained defendants' demurrer to the complaint with leave to amend back on March 29, 1978. There is a companion case in administrative mandamus before this court involving the same parties and the same contended facts under case number 36657. The court takes judicial notice of that action to which demurrers were also sustained with leave to amend on June 23, 1978.

The Fourth Amended Complaint in the within action (No. 36655) contains seven causes of action. Encapsulated they are:

- (1) The First Cause of Action is for declaratory relief.
- (2) The Second Cause of Action is for inverse condemnation.
- (3) The Third Cause of Action is for deprivation of access to the property for residential development.
- (4) The Fourth Cause of Action seeks reimbursement of assessments paid asserting recovery predicated on denial of due process.
- (5) The Fifth Cause of Action seeks recovery of assessments paid predicated on contract breach.
- (6) The Sixth Cause of Action seeks recovery of assessments paid predicated upon unjust enrichment.
- (7) The Seventh Cause of Action seeks damages for violation of the Civil Rights Act of 1871 urging deprivation of the property for any economically viable use.

All defendants in this action have joined in the Demurrers of every other defendant to each of the causes of action. All defendants in this action urge the same points and authorities in support of the demurrers to all seven causes of action.

At the time of oral argument plaintiff's counsel stated to the court that no further amendments were contemplated or sought and that plaintiff stood on its pleading under the Fourth Amended Complaint.

II. RULINGS OF THE COURT:

(1) Defendants' Demurrer to each and every cause of action upon the ground that each and every cause of action fails to state facts sufficient to constitute a cause of action is sustained without leave to amend.

(2) Defendants' Demurrer to each and every cause of action upon the ground that each and every cause of action fails to state facts sufficient to show the subject matter jurisdiction of this court in that plaintiffs have failed to exhaust their administrative and judicial remedies is sustained without leave to amend.

(3) Defendants' Demurrer to the First Cause of Action on the ground that the Board of Supervisors' denial or rejection of plaintiff's application for subdivision of the property is res judicata and not subject to collateral attack in the Superior Court in the within action is sustained without leave to amend.

(4) Defendants' Demurrer to the Second Cause of Action on the ground that the Board of Supervisors' denial or rejection of plaintiff's application for subdivision of the property is res judicata and not subject to collateral attack in the Superior Court in the within action is sustained without leave to amend.

(5) Defendants' Demurrer to the Third Cause of Action on the ground that the Board of Supervisors' denial or rejection of plaintiff's application for subdivision of the Property is res judicata and not subject to collateral attack in the Superior Court in the within action is sustained without leave to amend.

(6) Defendants' Demurrer to the Fifth Cause of Action on the Ground that the Board of Supervisors' denial or rejection of plaintiff's application for subdivision of the property is res judicata and not subject to collateral attack in the Superior Court in the within action is sustained without leave to amend.

(7) Defendants' Demurrer to the Sixth Cause of Action on the ground that the Board of Supervisors' denial or rejection of plaintiff's application for subdivision of the property is res judicata and not subject to collateral attack in the Superior Court in the within action is sustained without leave to amend.

III. FACTUAL BACKGROUND:

The three individual plaintiffs are styled a joint venture (plaintiff) although they were characterized in the earlier pleadings as a partnership. The defendants in the action are the COUNTY OF YOLO (COUNTY); CITY OF DAVIS (CITY); EL MACERO SEWER ASSESSMENT DISTRICT as an agency of the County of Yolo (DISTRICT) and JOHN L. DAHLER as Treasurer of Yolo County (TREASURER). Defendants are referred to collectively hereinafter as defendants.

Plaintiff owns unimproved real property located in Yolo County. The property is east of the City of Davis. The property was acquired by plaintiff in 1971 and has been owned by plaintiff since that time. No part of the property is located in the City of Davis although a portion is contiguous thereto.

At the time of the purchase of the property by plaintiff it was zoned single family and multiple residential by COUNTY. It is still so zoned by COUNTY.

In approximately 1973 and 1974 the CITY revised its General Plan styling plaintiff's property (which was not and is not in the CITY) as "agricultural reserve" realty. Prior to June 14, 1977 plaintiff sought subdivision approval for the property from COUNTY. At that time there was development occurring near the property in question. Plaintiff submitted a tentative subdivision map to COUNTY which was turned down in June of 1977.

In support of COUNTY'S denial of the tentative subdivision map the COUNTY found, inter alia, that the subdivision map did not comport with the general plan for the COUNTY and that it would render cultivation of nearby agricultural land unfeasible. The COUNTY further found that plaintiff could not arrange for public water nor arrange for access to the property by a public street and further that plaintiff had made no effort toward annexation for the property to CITY so that a sewer hookup would be available with concomitant service by a governmental entity.

The complaint in the instant action followed COUNTY'S turn-down of plaintiff's tentative subdivision map. Along with the present case plaintiff filed for Alternative Writ of Mandamus in Yolo County Superior Court action No. 36657.

IV. DISCUSSION AND RATIONALE:

Plaintiff's Fourth Amended Complaint seeks relief generally urging the following:

(1) The First Cause of Action is for declaratory relief. Plaintiff asserts that the requisite controversy to such an action exists between the parties because the state of mind of COUNTY was and is such that it (COUNTY) believes that it may lawfully restrict the use of plaintiff's property as alleged in the complaint. Plaintiff on the other hand contends that COUNTY'S actions in denying subdivision impose unlawful restrictions upon the property and in fact constitute an appropriation of the property for a public purpose without just compensation. Plaintiff asks the court to so declare.

(2) In the Second Cause of Action plaintiff seeks damages for inverse condemnation upon the theory that the General Plan designation by CITY of the property physically located in COUNTY reduced the property in question to zero value constituting a taking remediable in inverse condemnation.

(3) The Third Cause of Action alleges that plaintiff has no access in fact for any meaningful purpose to the property in question because it is of zero value in its present zoning posture being really only suited for subdivision and COUNTY has not built a road up to the property suitable for that type of use.

(4) The Fourth, Fifth and Sixth Causes of Action of the Fourth Amended Complaint seek repayment to plaintiff of all assessments paid to DISTRICT (allegedly in excess of \$75,000.) plus interest from the date of payment upon theories of illegal assessment, breach of a third party beneficiary contract, and unjust enrichment.

(5) The Seventh Cause of Action is styled as a civil rights violation under 42 U.S. Code § 1983 urging deprivation of plaintiff's civil rights by the actions of CITY and COUNTY depriving plaintiff of any economically viable use of the property through the restrictions imposed resulting in a taking of plaintiff's property for public use without just compensation assertedly in violation of the Fifth and Fourteenth Amendments to the United States Constitution as well as section 1983 of the *United States Code*.

INVERSE CONDEMNATION:

The court agrees that restrictive zoning which results in the property becoming an actual public acquisition or an actual use by the public body complained of may constitute a compensable taking for public purposes. (*Pinheiro vs. County of Marin*, 60 CA3d 323 at page 328). Such are not the alleged facts at bench. The Fourth Amended Complaint presents no factual allegations of actual acquisition or actual public use by any defendant to support the type of compensable taking referred to by the *Pinheiro* court.

Here, from the date of acquisition to the present, the COUNTY has been consistent in its zoning of plaintiff's land. It was and is zoned for single family and multiple residential uses. It is true that the CITY adopted a general plan referring to the property as "agricultural reserve" in the early 1970's. However, a valid cause of action cannot be predicated simply upon the adoption or implementation of a general plan by a public entity such as the CITY. (*Selby Realty Company vs. City of San Buenaventura*, 10 C3d 110 at pages 118 through 121).

Plaintiff urges that CITY and COUNTY have acted in conspiratorial consonance to deprive plaintiff of what (according to plaintiff) is obviously the only proper use for the property, that is for subdivision purposes as applied for to COUNTY. Plaintiffs aver that the actions of COUNTY and CITY are really actions in concert and somehow conspiratorially wrongful because the cooperative result is that plaintiff cannot subdivide its land as proposed.

The court fails to find factual underpinning for a compensable civil conspiracy between CITY and COUNTY simply because CITY and COUNTY discussed the use and development of the property in question in which they both have an obvious interest. Effectuating discussion toward property use in a given growing area with a view toward joint agreement does not yield a civilly actionable conspiracy by way of a cause of action under the Fourth Amended Complaint. A "conspiracy" involves an agreement grounded in corruption between at least two people with guilty knowledge on the part of each (*Morrison vs. California*, [1933] 291 U.S. 82, 70 Lawyers Edition, 664 at page 671 and 54 S. Court 281). No unlawful act or lawful act by unlawful means is alleged in the Fourth Amended Complaint (see *People vs. Stablemens' Union*, 156 C 581).

The court pointed out in its earlier Order Sustaining Demurrers and Granting Leave to Amend endorsed filed herein on March 30, 1978 that the property had obvious other uses than agriculture under the Yolo County Code section 8-2.502 permitting various principal uses in an A-E zone as well as multiple accessory uses set forth in section 8-2.503 of the Code (Order Sustaining Demurrers and Granting Leave to Amend at pages 6 and 7).

Plaintiff has attempted to overcome the court's indication of some value to the property under the ancillary uses as a matter of law in the earlier opinion although the allegation was and is that plaintiff's property has been reduced to zero value by the actions of the defendants.

The court earlier pointed out that the case of *HFH Ltd. vs. Superior Court*, 17 C3d 508 held that a "diminution" in value of property as a result of a zoning action would not support an inverse condemnation proceeding and that because of the many possible uses under the Code other than strictly agricultural uses that plaintiff could only allege a "diminution in value" as a matter of law since the property had some residual value on its face. Plaintiff has attempted to overcome that defect by alleging as conclusionary fact that each and every principal use and each and every multiple accessory use is no longer possible so that the property does have no value as zoned.

The court's earlier Order Sustaining Demurrers and Granting Leave to Amend was endorsed filed on March 30, 1978. The California Supreme Court reached the court's concern that a possible cause of action might be stated in inverse condemnation in event of a zoning regulation which forbade all use of the land in question reducing it to a no value status. The Supreme Court in *Agin vs. City of Tiburon*, 24 C3d 266 at page 274 through 277 determined the court's concern adversely to plaintiff. The Court there held that on balance plaintiff's remedy must be in declaratory relief rather than inverse condemnation in making complaint of adverse zoning consequences allegedly depriving plaintiff's property of any value whatsoever.

Additionally, inverse condemnation is supportable only by an invasion or appropriation of a cognizably valuable property right possessed by the land owner with the invasion or appropriation directly and specially affecting a land owner to his injury.

The court finds that under the pleadings here there are no allegations of fact alleging action by any defendant, severally or jointly, that has caused an invasion or appropriation of private property rights, such as: actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed (*Albers vs. County of Los Angeles*, 62 C2d 250) interference with the use and enjoyment of private property caused by a pre-condemnation activity (*Klopping vs. The City of Whittier*, 8 C3d 39) or interference with use and enjoyment of private property caused by any construction of a public improvement. (*Bacich vs. Board of Control*, 23 C2d 343).

The complaint fails to state a proper cause of action for inverse condemnation.

DECLARATORY RELIEF:

It is true that the Supreme Court in *Agin vs. City of Tiburon*, 24 C3d 266 at pages 276 and 277 indicates that plaintiff must turn to mandamus "or declaratory relief" instead

of inverse condemnation and that plaintiff has averred declaratory relief in the First Cause of Action. That theory however fails because plaintiff does not attack the constitutionality of the ordinances or statutes in question on their face but merely in their application. In such instance declaratory relief is not available (*State of California vs. Superior Court*, 12 C3d 237 at page 251). The remedy is administrative mandamus which plaintiffs have concededly not exhausted under case No. 36657 in this court.

The action for declaratory relief under the First Cause of Action also falls upon the allegations which at bottom complain of the administrative orders and administrative application of defendant COUNTY and defendant CITY. Such orders are subject to review by an administrative writ of mandate. (*State of California vs. Superior Court*, 12 C3d 237 at page 249 and *Guilbert vs. Regents of the University of California*, 93 CA3d 233 at page 244).

No cause of action in declaratory relief has been stated.

DEPRIVATION OF ACCESS:

Plaintiff's Third Cause of Action is alleged deprivation of access. What plaintiff truly urges is deprivation of access to the property as a subdivision. Plaintiff does not claim that the parcel has no access at all.

In the language of the California Supreme Court in *Furey vs. City of Sacramento*, 24 C3d 862 at page 872, footnote 6: Plaintiff's "... true complaint is that they have not been permitted to utilize their land in a manner which would allow them to make the maximum use of that access." (*Furey vs. City of Sacramento*, 24 C3d 862 at page 872, footnote 6 in pertinent part).

Under the pleadings at bench there is access to the property. Deprivation of the type of access desired by plaintiff does not rise to the dignity of an independent cause of action for compensable deprivation of access.

Further, the deprivation of access cases ground recovery in factual situations where there has been damage or physical

deprivation of an existing roadway to the property. (*Sacramento and San Joaquin Drainage District vs. Goehring*, 13 CA3d 58; *City of Los Angeles vs. Ricards*, 10 C3d 385). No such facts have been alleged by plaintiff.

The complaint states no cause of action for deprivation of access.

THE CIVIL RIGHTS CLAIMS:

Plaintiff's Seventh Cause of Action urges money damages against the defendants for compensation of an alleged violation by the defendants' actions and zoning regulations assertedly depriving plaintiff of any economically viable use of the property in violation of 42 U.S. Code § 983 and Amendments 5 and 14 of the *United States Constitution*. In essence, plaintiff alleges that the actions of defendants have restricted the property to agricultural reserve open space yielding a taking without just compensation entitling plaintiff to money damages.

Applying the Federal Fifth Amendment to this state action through the due process clause of the Fourteenth Amendment requires factual allegations sufficient to state a cause of action to show deprivation of plaintiff's property by state action "without due process of law" (see *Parratt vs. Taylor*, 101 Supreme Court 1908 at page 1913).

In ruling that plaintiffs have not exhausted their administrative and judicial remedy through administrative mandamus the court also holds that such remedy affords plaintiff due process of law for the alleged improper state action by CITY and COUNTY through application of zoning ordinances and regulations and denial of plaintiff's proposed subdivision.

Additionally, the Seventh Cause of Action is in reality a pleading in inverse condemnation seeking damages comprised of just compensation (see paragraph 5(1) of the Seventh Cause of Action at pages 31 and 32 of the Fourth Amended Complaint). Monetary damages for inverse condemnation in a case filed under 42 *United States Code* § 1983 are not available. (*Jacobson vs. Tahoe Regional Planning Agency*, 474 Fed. Supp. 901 at pages 903 and 904; *Agins vs. City of Tiburon*, 24 C3d 266).

Defendants' Demurrer to the Seventh Cause of Action is sustained without leave to amend.

THE CLAIMS FOR ASSESSMENT REIMBURSEMENT:

The Fourth, Fifth and Sixth Causes of Action represent different theories of pleading to obtain reimbursement of assessment allegedly paid by plaintiffs to DISTRICT. Plaintiffs allege that the monies were paid and no beneficial services were received nor will any benefits be received in the future because of the actions of the defendants.

Speaking vernacularly plaintiffs allege that they have paid money to DISTRICT for the construction of sewers and that because of the actions of CITY and COUNTY they have not received and will never receive any sewer improvements or facilities.

No cause of action is stated as to the Fourth, Fifth and Sixth Causes of Actions because plaintiffs have not alleged and concededly cannot allege that they have exhausted one of their administrative remedies which is a request for reassessment of the property under the *Streets and Highways Code* §§ 5550 and 5565. Thus, plaintiffs here are not in the posture of the plaintiffs in *Furey vs. City of Sacramento*, 24 C3d 862 where the plaintiff had in fact pursued and exhausted that administrative remedy.

The California Supreme Court in *Furey* points out that the Improvement Act of 1911 provides explicitly for situations wherein facts which take place after the original assessment render that assessment unjust. (See *Furey vs. City of Sacramento*, 24 C3d 862 at pages 873 and 874 where the plaintiff had exhausted this remedy). The seeking of such remedy is a conditional prerequisite to stating a cause of action and, if exhausted adversely, the remedy thereafter is in mandamus or declaratory relief and not in a civil action for damages by way of recoupment. (*Furey vs. City of Sacramento*, 24 C3d 862 at pages 877 and 878).

Defendants' Demurrer to the Fourth, Fifth and Sixth Causes of Action is sustained without leave to amend.

The court's Rulings on Demurrer to Fourth Amended Complaint being dispositive the Motion For Pretrial Summary Judgment is mooted and no ruling is made thereon.

Defendants are entitled to their costs of suit.

Defendants are ordered to prepare Judgment in keeping with the foregoing rulings of the court.

DATED: July 20, 1982

/s/

HARRY A. ACKLEY
Judge of the Superior Court

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO

MACDONALD, SOMMER & FRATES,
a partnership,
Plaintiff,

v.

THE COUNTY OF YOLO, and
THE CITY OF DAVIS,
Defendants.

NO. 36655

JUDGMENT OF
DISMISSAL BASED
ON RULING
SUSTAINING
DEMURRER
WITHOUT LEAVE
TO AMEND

The demurrer of defendant COUNTY OF YOLO and defendant CITY OF DAVIS to the plaintiff's fourth amended complaint came on regularly for hearing on June 3, 1982, before Department III of the above-entitled court, Judge Harry A. Ackley presiding. Arguments were heard, additional memoranda were filed, and the motion was submitted for decision by the court on June 10, 1982. Plaintiff was represented by its counsel of record with attorney Edward R. MacDonald appearing. The demurring defendant COUNTY OF YOLO was represented by its counsel of record, with attorney Richard W. Sherwood appearing. The demurring defendant CITY OF DAVIS was represented by its counsel of record, with attorney William L. Owen and City Attorney P. Lawrence Klose appearing. The court having received the points and authorities together with supporting documents, having heard the oral arguments of counsel, and the matter having been submitted for decision, and the court being fully apprised in the matter, and good cause appearing therefor, defendants' demurrer to plaintiff's fourth amended complaint is sustained without leave to amend on the following grounds:

(1) That each and every cause of action fails to state facts sufficient to constitute a cause of action;

(2) That each and every cause of action fails to state facts sufficient to show the subject matter jurisdiction of this court in that plaintiffs have failed to exhaust their administrative and judicial remedies;

(3) That defendants' demurrer to the First Cause of Action, Second Cause of Action, Third Cause of Action, Fifth Cause of Action and Sixth Cause of Action is sustained on the ground that the Board of Supervisors' denial or rejection of plaintiff's application for subdivision of the property is res judicata and not subject to collateral attack in the Superior Court.

The order sustaining the defendants' demurrer herein without leave to amend was rendered on July 20, 1982, and entered in the Book of Judgments on July 21, 1982. Notice of the Court's Ruling was served by mail on July 21, 1982.

Application having been made to the Clerk of this Court for entry of judgment in favor of defendants and against plaintiffs, and good cause appearing therefor, it is ordered, adjudged and decreed that this action be, and the same hereby is, dismissed with prejudice, and that plaintiffs are to take nothing by this action. Defendant COUNTY OF YOLO is to recover its costs herein incurred in the sum of \$104.62. Defendant CITY OF DAVIS is to recover its costs herein incurred in the sum of \$562.79. Costs to be inserted by the Clerk per costs memorandum unless objections filed.

DATED: August 17, 1982

/s/

HARRY A. ACKLEY
Judge of the Superior Court

**COURT OF APPEAL OF
THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

REQUEST FOR JUDICIAL NOTICE ON APPEAL

(Title Omitted in Printing)

Plaintiff-Appellant hereby requests that this Court take judicial notice of the following:

(1) The fact that the City of Davis and the County of Yolo adopted proposed sewer construction which would exclude the subject property from service by Yolo County Agreement No. 74-214.

(2) Letter from Gloria McGregor, Davis Community Development Director, and Danny Figueroa, Associate Planner, dated August 29, 1975, conditioning approval of subdivision on "connecting property" upon Plaintiff's cutting off access to the subject property.

(3) Resolution Number 1889, Series 1975, dated January 1976, of the City of Davis.

(4) Approval of subdivision by City of Davis on property belonging to a third party adjacent to subject property was conditioned upon the party's development of a plan that would cut off easement for access to the subject property.

(5) Stipulation to continue hearing on motion to dismiss the mandate action, Yolo County Superior Court No. 36657 until termination of proceeding on appeal herein.

POINTS AND AUTHORITIES

On appeal the reviewing Court shall take judicial notice of "... (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453." (California Evidence Code Section 459(a).) With respect to requests (1), (2) and (3), the trial court properly took judicial notice thereof at the hearing on demurrer when it was presented with sufficient documentation by way of noticed motion (CT:1351-1361; 1573-1574; and

1590-1593, respectively) and opposing counsel had an opportunity to be heard. (RT:113, CT:1342; RT:130-133; and RT:106-110, respectively.)

With respect to item No. (4), the Court is referred to Exhibit "A" attached to these Points and Authorities and incorporated herein being a certified copy of the official subdivision map entitled "Macero Del Norte Unit No. 7." This Court is requested to take judicial notice of said map under California Evidence Code Section 459(a) authorizing the reviewing court to take judicial notice of any matter specified in California Evidence Code Section 452. More specifically, subsections (b), (c) and (h) thereof permit judicial notice of regulations of any public entity in the United States, official acts of the legislative departments of any state of the United States, and facts and propositions that are not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

With respect to Item No. (5), the Court is referred to Exhibit "B" attached to these Points and Authorities and incorporated herein being a certified copy of the letter stipulation on file continuing the hearing on motion to dismiss the mandate action of Yolo County Superior Court Action 36657 until the within appeal is determined. This Court is requested to take judicial notice of said stipulation under California Evidence Code Section 452(d), i.e., "[R]ecords of ... any court of this state. . ."

DATED: December 3, 1984.

Respectfully submitted,

MACDONALD AND
TERANISHI

By /s/

Edward R. MacDonald
Attorney for Appellant
MacDonald, Sommer & Frates

NOT TO BE PUBLISHED
C O P Y
IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
THE THIRD APPELLATE DISTRICT
(YOLO)

MACDONALD, SOMMER & FRATES,
a Partnership,

Plaintiff and Appellant,

v.

THE COUNTY OF YOLO and
THE CITY OF DAVIS.

*Defendants and
Respondents.*

3 Civ. 22306
(Super.Ct.No. 36655)

Plaintiff MacDonald, Sommer & Frates, a joint venture, appeals from a judgment of dismissal entered after the Superior Court of Yolo County sustained demurrers to its complaint for the alleged deprivation of real property without just compensation. Plaintiff contends that it has stated causes of action for inverse condemnation, for denial of access, and under the federal Civil Rights Act (42 U.S.C. § 1983), and that its complaint is not barred by the failure to exhaust administrative remedies nor by principles of res judicata. We hold that the complaint does not allege facts sufficient to constitute causes of action in inverse condemnation, denial of access or under the federal Civil Rights Act. Accordingly we need not consider whether the complaint was barred by the failure to exhaust

administrative remedies or by res judicata. We shall affirm the judgment of dismissal.¹

FACTS

Plaintiff filed its fourth amended complaint on October 27, 1981. Since we consider whether the trial court correctly sustained a demurrer to this complaint we must accept as true all the properly pled factual allegations of the complaint. (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 511.) The following factual allegations are contained in the complaint.

In October 1971 plaintiff acquired title to a parcel of real property in the County of Yolo, which we will refer to as "the property." The property is within the County of Yolo, but outside of the boundaries of the City of Davis. Plaintiff also owns another parcel of property, referred to as the "connecting property," which is within the boundaries of the City of Davis. The property is well situated for development as residential property, and since 1966 has been designated in the County's general plan and zoning ordinances for single family and multiple residential use. The property is contiguous to other

¹ Defendants have asked that we take judicial notice of the agricultural use of appellant's property, that nematodes do not prevent agricultural use, that the soil of the land is prime agricultural soil, and that the property has monetary value. Since these are not matters of common and accepted knowledge they are not subject to judicial notice. (*Galloway v. Moreno* (1960) 183 Cal.App.2d 803, 809; *Berry v. Chaplin* (1946) 74 Cal.App.2d 669, 676.) Defendants' motion is denied.

Plaintiff has also asked us to take judicial notice of certain matters. The trial court took judicial notice of the first three items, and we shall do likewise. (Evid. Code, § 459, subd. (a).) The fourth item is an official act of the City of Davis, and the fifth item is a stipulation for a continuance of plaintiff's pending mandate action. These items are appropriate for judicial notice and plaintiff's motion is granted.

property which has been developed for single family residential use, and is near another parcel which has recently been approved for development as single family residences.

Plaintiff alleges the property is not suitable for agricultural use for a variety of reasons. Specifically, the topsoil has been removed under threat of condemnation, the soil is infected with nematodes which destroy crops or increase farming costs, and the proximity of residential property makes cultivation economically unprofitable.

Plaintiff further alleges that the provision of goods and services to the property for residential development is possible and feasible. The property is adjacent to the connecting property owned by plaintiff, which is served by a developed public street which could be extended through the connecting property to the subject property. The property has been included within the El Macero Sewer Assessment District for purposes of service by a sewage disposal system. Domestic water is available, as are police and fire protection services on adjoining property.

The City and the County have denied all access to the property from existing developed streets by refusing to permit connection thereto, deprived the property of sewage disposal service despite the fact that the plaintiff and its predecessors in interest have paid assessments for many years, denied that available water exists, and refused to permit the provision of police and fire protection services. As a result, the City and County have deprived the property of any beneficial use which is not economically infeasible, prohibited by law, or prevented by actions of the City and County.

In 1961 the County created the El Macero Sewer Assessment District for the purpose of assessing lands to raise funds for construction of a sewage treatment plant and facilities. The subject property was within the lands to be assessed and served. In 1966 the City annexed approximately 760 acres of land within the District and assumed responsibility for governmental services formerly provided by the County. This included certain governmental services for the subject property. In 1968 the County created the El Macero County Service Area to

perform services with proceeds from the District assessments. In 1970 the City created the Davis Municipal Sewer Facilities No. 1, and jointly undertook with the District to create facilities to service certain land, which included the subject property. In 1972 the City, acting for the County and District, applied for a grant contract from the federal government and the state to construct sewer and drainage improvements. In the application the City represented that the improvements would serve a population calculated by assuming development of the subject property. Subsequently the City, County and District revised the project to exclude the subject property and reduced the size and service capacities of the project facilities. The City amended its general plan to revise downward the projected population growth, to reduce the ultimate population of the District, and to adopt the "restrictive and parochial policies" which violate the City's duty to provide for regional housing needs. Although the County did not revise its general plan and zoning ordinance, it agreed with the City to implement its illegal policies. The City, County and District continued to seek state and federal funds for the construction of facilities and in doing so conspired to defraud the state and federal governments. Plaintiff has paid approximately \$75,000 in assessments to the District on the basis that the property would be benefited, but the City, County and District have precluded plaintiff from being able to make use of the facilities for which it was assessed.

In 1975 plaintiff applied for approval of a subdivision map from the County. The City acted to prevent the County from approving the application. Specifically the City: (1) advised the County that the property has been designated "agricultural preserve" or "agricultural reserve" on the City's general plan; (2) approved a subdivision map on the Simmon's parcel upon condition that the parcel be annexed to the City and upon development of a street configuration which would deprive the subject property of access to public streets; (3) refused to accept dedication of portions of the connecting property for purposes of extending an existing public street to serve the subject property, refused to permit the extension of the street as a private road, and refused to permit the County or other

governmental agency to extend or maintain the street on the connecting property; (4) announced that it would refuse to accept dedications of public facilities, refuse to accept annexation of the property, and refuse to provide city services to the property. The County denied plaintiff's subdivision application. In doing so the County determined that the property lacked access by suitable public streets, lacked sewer services, lacked an adequate water supply, and lacked adequate police and fire services. The property is not suited for any of the uses permitted in the Yolo County Code. Any application for a zone change, variance or other relief would be futile.

Plaintiff set forth seven causes of action based upon these allegations. On appeal it has abandoned the first, fourth, fifth and sixth causes of action in the complaint. We shall here discuss only the remaining second, third and seventh causes of action.

In its second cause of action plaintiff sought damages for inverse condemnation. Plaintiff alleged that the actions of the City and County deprived it of the entire economic value and beneficial use of the property. In the third cause of action plaintiff sought damages for denial of access. Plaintiff alleges that the City and County intentionally deprived it of access to the property suitable for residential development, and have used the lack of access as an excuse for denying approval for development. The seventh cause of action was based on the federal Civil Rights Act. (42 U.S.C. § 1983.) Plaintiff alleges the City and County have acted in a manner which amounts to a taking of private property without just compensation.

The trial court sustained demurrers to the fourth amended complaint without leave to amend. The court ruled with respect to each cause of action that the complaint failed to state facts sufficient to constitute causes of action. The court also ruled that with respect to each cause of action the plaintiff had failed to exhaust its administrative remedies. The court further ruled with respect to the second and third causes of action, that the County Board of Supervisor's denial or rejection of the application for a subdivision is res judicata and not subject to collateral attack.

DISCUSSION

I. Inverse Condemnation

In recent times actions in inverse condemnation based upon governmental regulation of the use of land have been common. In *HFH, Ltd. v. Superior Court*, *supra*, 15 Cal.3d 508, the Supreme Court held that a zoning action which merely decreases the market value of property does not violate constitutional provisions against the taking or damaging of property without compensation and therefore cannot support a cause of action in inverse condemnation. (15 Cal.3d at p. 518.) In *HFH* the Court specifically left open the question whether a regulation which forbids substantially any use of the land in question may give rise to a cause of action in inverse condemnation. (*Id.*, at p. 518. fn. 16.)

In *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 275, the Court considered the question left open in *HFH*. The Court said: "We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." The Court added: "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." (*Id.*, at pp. 276-277.) On appeal to the United States Supreme Court the decision was affirmed. However the High Court did not consider whether a state may limit the remedies available where land has been taken, since the Court agreed that under the circumstances no taking occurred. (*Agins v. Tiburon* (1980) 447 U.S. 255, 263 [65 L.Ed.2d 106, 113-114]. See also *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 628 [67 L.Ed.2d 551, 558].)

We find the decision in *Agins* to be controlling herein. In that case the Supreme Court specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation. We emphasize that the Court did not hold that

regulation cannot amount to a taking without compensation, it simply held that in such event the remedy is not inverse condemnation. The remedy instead is an action to have the regulation set aside as unconstitutional. (See *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 874.) Plaintiff has filed a mandate action in the trial court which is currently pending. That is its proper remedy. The claim for inverse condemnation cannot be maintained.²

In support of its position plaintiff also relies upon the recent decision in *Sederquist v. City of Tiburon* (9th Cir. 1984) 746 F.2d 543. There the landowners were owners of 7 lots in an illegal subdivision called Hacienda Heights in the City of Tiburon. When they acquired their lots they also received a grant of a 50 foot roadway easement on a dirt strip called Hacienda Drive. Two of the lot owners applied to the city for a permit to pave that strip. The city denied the application because it was inconsistent with a proposed (and later adopted) "circulation element" for that area, and because the land was undeveloped and already had a satisfactory access for its present use. One of lot owners, the Sederquists, also applied for a variance from the subdivision provisions of the zoning ordinance requiring a master plan. They declared that the other lot owners in Hacienda Heights would not cooperate in attempting to develop a master plan. The city denied that application as well. The Sederquists then filed suit in the federal district court claiming among other things that the city's denials constituted inverse condemnation and a denial of due process. The trial court granted the city's motion for summary judgment and the Sederquists appealed. The Court of Appeals for the Ninth Circuit, in a split decision, reversed the lower court, holding that a genuine issue of material fact existed as to whether the city's requirement that the landowners submit a master plan required a type of joint action prohibited under

² Plaintiff attempts to distinguish the decision in *Agins*, by contending that in that case the Court referred only to inadvertent impositions on land use through regulation, rather than intentional impositions. The argument fails. Inverse condemnation arises only from a deliberate act carrying out public policy. (*Yee v. City of Sausalito* (1983) 141 Cal.App.3d 917, 920.) If the imposition in *Agins* had not been deliberate there would have been no need to determine whether inverse condemnation was an appropriate remedy. Moreover, all land use planning is, or should be, intentional. Nothing in *Agins* suggests the limitation urged by plaintiff.

state law and thus resulted in a taking for Fifth Amendment purposes. In the course of its decision the majority considered the city's contention that the circulation element is only a general plan which does not amount to inverse condemnation. The Court responded that the conditions imposed by the city requiring joint action of other owners on the master plan may constitute a taking and for that same reason the landowners could challenge the circulation element. It conceded that the city could properly impose zoning restrictions on property and asserted only that it could not do so "[by] means [which] may be illegal under California law." (*Id.*, at p. 548.) That case has no bearing on this appeal because there is no illegal joint action required by the city here. In any event, we agree with the dissent that "[i]t is inconceivable that the denial of an application to pave a private driveway constitutes a taking of property. The denial does not affect the applicants' right to use their property in a lawful manner." (*Id.*, at p. 551.)

In any event, even if an inverse condemnation action were available in a land use regulation situation, we would be constrained to hold that plaintiff has failed to state a cause of action. Pared to their essence, the allegations are that plaintiff purchased property for residential development, the property is zoned for residential development, plaintiff submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application. In these allegations plaintiff is not unlike the plaintiffs in *Agins*. There the plaintiffs had purchased approximately five acres for residential development. The plaintiffs alleged that the land had greater value than any other suburban land in California. (See *Agins v. Tiburon*, *supra*, 447 U.S. at p. 258 [65 L.Ed.2d at p. 110].) The City adopted a zoning regulation which would have limited the development of the land to one to five residential units. (*Agins v. City of Tiburon*, *supra*, 24 Cal.3d at p. 271.) Without attempting to obtain approval to so develop the land, the plaintiffs brought an action alleging that the City's action had completely destroyed the value of the land for any purpose or use. Under these circumstances both the California Supreme Court and the United States Supreme Court held that the

plaintiffs had failed to allege facts which would establish an unconstitutional taking of private property. (447 U.S. at pp. 262-263 [65 L.Ed.2d at p. 113]; 24 Cal.3d at pp. 277-278.)

The plaintiff's claim here must fail for the same reasons the claims in *Agins* failed. Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action.

II. Denial of Access

Plaintiff contends that it has stated a cause of action in inverse condemnation for denial of access. The basis of this contention is the allegation that the City has indicated it would oppose the extension of Cowell Boulevard through the plaintiff's connecting property to the subject property, and would refuse to accept a dedication of such an extension. Plaintiff relies upon the decision in *Jones v. People ex rel. Dept. of Transportation* (1978) 22 Cal.3d 144.

We find the decision in *Jones* to be inapposite. In that case the plaintiffs owned property with existing access to a public road. The State planned a freeway which would compel it to condemn a portion of the plaintiffs' property and which would cut off their existing access. Under these circumstances the Supreme Court held that the plaintiffs were entitled to recover in inverse condemnation. The decision makes clear, however, that the actionable taking was the interference with an existing access, and not the mere refusal to provide access where none had existed before. (22 Cal.3d at p. 151. See also *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 388.)

This requirement of an existing right was highlighted in *Hollister Park Inv. Co. v. Goleta County Water Dist.* (1978) 82 Cal.App.3d 290. There a landowner was unable to obtain a new connection to the water district's water service due to certain resolutions calling for a moratorium on new connections during emergency conditions and pending study. The landowner contended that the inability to obtain a connection rendered the land unsuitable for development, or for any purpose, and sought damages in inverse condemnation. The Court of Appeal held that no cause of action was stated. In order for a landowner to state a cause of action in inverse condemnation there must be an invasion or an appropriation of some valuable property which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury. (82 Cal.App.3d at p. 293.) The landowner had no existing right which was interfered with by the district. The court concluded that damage to the landowner from the refusal to permit new connections was not compensable; if the district were not carrying out a legal duty then the remedy was a petition for a writ of mandate. (*Id.*, at p. 294.)

The reasoning of the decision in *Hollister Park Inv. Co.* is equally applicable here. Plaintiff complains that the City will not give it access to its property by extension and dedication of a public roadway. However, a cause of action in inverse condemnation for the denial of access can only arise where the government interferes with existing access, it does not arise from the refusal to provide access where none existed before. Plaintiff has consequently failed to state a cause of action for denial of access.³

³ In any event, it is clear that plaintiff's true complaint is that it has not been allowed to utilize the land in a manner which would make maximum use of access rather than that all access has been denied. Such a complaint is not compensable in inverse condemnation. (*Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 872, fn. 6.)

III. Civil Rights Act

Plaintiff contends that even if the sole California remedy for restrictive land use regulation is mandate or declaratory relief, the same facts give rise to a cause of action under the federal Civil Rights Act. (42 U.S.C. § 1983) We cannot agree. In order to state a cause of action under the federal act it is necessary to allege that there has been a deprivation of a property right by the state or by persons acting under color of state law. (*Parratt v. Taylor* (1981) 451 U.S. 527, 536 [68 L.Ed.2d 420, 429].) But those allegations are not in themselves enough. The plaintiff must also be able to allege that the deprivation was without due process of law. (*Id.*, at p. 537 [68 L.Ed.2d at p. 430].) Whether a deprivation occurs without due process of law depends upon whether the state has provided an adequate remedy in the event of a deprivation. (*Id.*, at pp. 537-539 [68 L.Ed.2d at pp. 430-431].) The United States Supreme Court has not determined whether a State may limit the remedies available to a person whose land has been taken without just compensation to exclude monetary damages. (*Agins v. Tiburon*, supra, 447 U.S. 263 [65 L.Ed.2d at pp. 113-114].) Nevertheless, as an intermediate state appellate court, we are constrained by principles of stare decisis to conclude that adequate remedies do exist in the event land use regulation does amount to an uncompensated taking of private property. (*Agins v. City of Tiburon*, supra, 24 Cal.3d at pp. 276-277.) Accordingly we hold that plaintiff has not stated a cause of action for the violation of its civil rights. (See also *Gilliland v. County of Los Angeles* (1981) 126 Cal.App.3d 610, 617.)

In any event, what we said with regard to inverse condemnation applies equally here. Even if a cause of action for monetary damages could be stated under the Civil Rights Act based upon the regulation of the use of property, the allegations would be insufficient in this case. Plaintiff seeks compensation because the County refused approval of the intensive development it desires, but that refusal does not mean that other, less intensive uses would also be denied. Accordingly plaintiff has not alleged facts sufficient to establish an uncompensated taking of its property. (*Agins v. City of Tiburon*, supra, 24 Cal. 3d at pp. 277-278.)

The judgment is affirmed.

SPARKS, J.

We concur:

CARR, Acting P.J.

SIMS, J.

PORTIONS OF THE YOLO COUNTY CODE CHAPTER 2. ZONING

Article 1. Title, Adoption, Scope and Purpose

Sec. 8-2.101. Title.

This chapter shall be known as, and may be cited as, the "Zoning Regulations of the County". In any administrative action taken by any public official pursuant to the authority set forth in this chapter, the use of the term "Zoning Regulations", unless further modified, shall also refer to and mean the provisions of this chapter.

* * *

Sec. 8-2.104. Purpose.

The provisions of this chapter are adopted to promote and protect the public health, safety, morals, comfort, convenience, and general welfare, to provide a plan for sound and orderly development, and to ensure social and economic stability within the various zones established by the provisions of this chapter.

Article 2. Definitions

* * *

Sec. 8-2.208. Agriculture.

"Agriculture" shall mean the use of land for agricultural purposes, including farming, dairying, pasturage, agriculture, horticulture, floriculture, viticulture, apiaries, and animal and poultry husbandry, and the necessary accessory uses thereto; provided, however, the operation of any such accessory uses shall be secondary to that of the normal agricultural activities. For the purposes of this section, "accessory use" shall mean supply, service, storage, and processing areas and facilities for any other agricultural land. The uses set forth in this section shall not include stockyards, slaughterhouses, hog farms, fertilizer works, or plants for the reduction of animal matter.

* * *

Sec. 8-2.260. Lot, building site.

"Building site lot" shall mean a parcel of land, exclusive of public streets or alleys, occupied or intended to be occupied by a main building or group of such buildings and accessory buildings, together with such open spaces, yards, minimum width, and area as required by the provisions of this chapter, and having full frontage on an improved and accepted public street which meets the standards of widths and improvements specified by the County for the street in question, or having either partial frontage on such street or access thereto by a recorded right-of-way or recorded easement, which partial frontage right-of-way or easement is determined by the Commission to be adequate. In subdivision areas a building site shall be any portion of a filed and recorded lot or any combination of contiguous lands, including more than a lot, which meets the minimum area and width requirements of the zone in which located and which is so shaped that a building having the minimum area, as set forth in the Building Code adopted by the provisions of Chapter 1 of Title 7 of this Code, for the purpose intended for such building could be constructed in compliance with all the yard requirements of such zone.

For the purposes of this chapter, a lot shall not be restricted to a parcel of land identified on a filed and recorded subdivision by lot number.

* * *

Sec. 8-2.265. Lot lines.

"Lot lines" shall mean the property lines bounding a lot. The definitions set forth in Sections 8-2.266 through 8-2.268 of this article shall be applicable to lots which are basically square or rectangular in shape. When such definitions are not applicable due to irregularity in the shape of the lot, as would be the case with a triangular or wedge-shaped lot, "lot lines" shall be as determined by the Planning Director, subject to appeal and review by the Commission.

* * *

Sec. 8-2.299.23. Use, conditional.

"Conditional use" shall mean a principal or accessory use of land or of structures thereon, which use may be essential or desirable to the public convenience or welfare in one or more zones, but which use may also impair the integrity and character of the zone or adjoining zone or be detrimental to the public health, morals, or welfare unless additional restrictions on the location and extent of the use are imposed and enforced. Such use shall become a principal permitted use or accessory use when all specific additional restrictions are completed and permanently satisfied in conformance with an approved use permit. Should such restrictions be of a continuing nature, the use shall remain conditional so long as the restrictions are complied with but shall become an unlawful use whenever and so long as the restrictions are not complied with. A conditional use shall require a use permit from the Board of Zoning Adjustment as provided in Article 28 of this chapter.

* * *

Sec. 8-2.299.25. Use, principal permitted.

"Principal permitted use" shall mean the primary use of land or a main building, which use is compatible with the purpose of the zone and which is permitted in the zone. If a use is listed in a specific zone as a principal permitted use, it shall mean that the owner, lessee, or other person who has a legal right to use the land has a vested right to conduct such principal permitted use without securing special permission therefor, subject only to the general limitations, such as off-street parking and site plan approval, as are generally applied to all uses in such zone. (A principal permitted use shall not require a permit from the Board of Zoning Adjustment.)

* * *

Article 3. Designation of Zones

Sec. 8-2.301. Enumerated.

The several zones hereby established and into which the County is divided are designated as follows:

- (a) A-P Agricultural Preserve Zone;
- (b) A-E Agricultural Exclusive Zone;
- (c) A-1 Agricultural General Zone;
- (d) R-S Residential Suburban Zone;
- (e) R-1 Residential One-Family Zone;
- (f) R-2 Residential One-Family or Duplex Zone;
- (g) R-3 Multiple-Family Residential Zone;
- (h) R-4 Apartment-Professional Zone;
- (i) C-1 Neighborhood Commercial Zone
- (j) C-2 Community Commercial Zone;
- (k) C-3 General Commercial Zone;
- (l) C-H Highway Service Commercial Zone;
- (m) M-L Limited Industrial Zone;
- (n) M-1 Light Industrial Zone;
- (o) M-2 Heavy Industrial Zone;
- (p) PR Park and Recreation Zone;
- (q) PD Planned Development Zone;
- (r) AV Airport Zone;
- (s) H Special Height Combining Zone;
- (t) B Special Building Site Combining Zone; and
- (u) F Special Flood Plain Combining Zone.

Article 8. Residential One-Family Zone (R-1)

Sec. 8-2.801. Purpose (R-1).

The purpose of the Residential One-Family Zone (R-1) shall be to stabilize and protect the residential characteristics of the zone and to promote and encourage a suitable environment for family life. The R-1 Zone is intended to be used only for single-family homes and the services appurtenant thereto.

Sec. 8-2.802. Principal permitted uses (R-1).

The following principal uses shall be permitted in the R-1 Zone:

- (a) One single-family dwelling per lot.

Sec. 8-2.803. Accessory uses (R-1).

The following accessory uses shall be permitted in the R-1 Zone:

- (a) Pets, household;
- (b) Rooming and boarding of not more than two (2) persons;
- (c) Signs as provided in Section 8-2.2406 of Article 24 of this chapter; and
- (d) Other accessory uses and accessory buildings customarily appurtenant to a permitted use, subject to the requirements of Section 8-2.2602 of Article 26 of this chapter.

Sec. 8-2.804. Conditional uses (R-1).

The following conditional uses shall be permitted in the R-1 Zone:

- (a) Buildings and structures, public and quasi-public, and uses of a recreational, educational, religious, cultural, or public service type, not including corporation yards, storage or repair yards, warehouses, and similar uses;
- (b) Communication equipment buildings;
- (c) Foster homes, day nurseries, nursery schools, and day care centers;

- (d) Guest houses;
- (e) Home occupations;
- (f) Off-street public parking areas on building sites contiguous to nonresidential zones, subject to the provisions of Article 25 of this chapter; and
- (g) Temporary tract offices.

Article 9. Residential One-Family or Duplex Zone (R-2)

Sec. 8-2.901. Purpose (R-2).

The purpose of the Residential One-Family or Duplex Zone (R-2) shall be to stabilize and protect the residential characteristics of a zone where a compatible mingling of single-family dwellings and duplex dwellings is likely to occur and to promote and encourage a suitable environment for family life. The R-2 Zone is intended for residences and the community services appurtenant thereto.

Sec. 8-2.902. Principal permitted uses (R-2).

The following principal uses shall be permitted in the R-2 Zone:

- (a) One single-family dwelling or one duplex dwelling per lot.

Sec. 8-2.903. Accessory uses (R-2).

The following accessory uses shall be permitted in the R-2 Zone:

- (a) Pets, household;
- (b) Rooming and boarding of not more than two (2) persons;
- (c) Signs as provided in Section 8-2.2406 of Article 24 of this chapter; and
- (d) Other accessory uses and accessory buildings customarily appurtenant to a permitted use, subject to the

requirements of Section 8-2.2602 of Article 26 of this chapter.

Sec. 8-2.904. Conditional uses (R-2).

The following conditional uses shall be permitted in the R-2 Zone:

- (a) Buildings and structures, public and quasi-public, and uses of a recreational, educational, religious, cultural, or public service type, not including corporation yards, storage or repair yards, and warehouses;
- (b) Communications equipment buildings;
- (c) Foster homes, day nurseries, nursery schools, and day care centers;
- (d) Guest houses;
- (e) Home occupations;
- (f) Off-street public parking areas on sites contiguous to non-residential zones, subject to the provisions of Article 25 of this chapter; and
- (g) Temporary tract offices.

Article 10. Multiple-Family Residential Zone (R-3)

Sec. 8-2.1001. Purpose (R-3).

The purpose of the Multiple-Family Residential Zone (R-3) shall be to stabilize and protect the residential characteristics of the zone.

Sec. 8-2.1002. Principal permitted uses (R-3).

The following principal uses shall be permitted in the R-3 Zone:

- (a) Dwellings, multiple-family;
- (b) Dwellings, single-family and duplex; and
- (c) Rooming and boarding of not more than six (6) persons.

Sec. 8-2.1003. Accessory uses (R-3).

The following accessory uses shall be permitted in the R-3 Zone:

- (a) Pets, household;
- (b) Signs as provided in Section 8-2.2406 of Article 24 of this chapter; and
- (c) Other accessory uses and accessory buildings customarily appurtenant to a permitted use, subject to the requirements of Section 8-2.2602 of Article 26 of this chapter.

Sec. 8-2.1004. Conditional uses (R-3).

The following conditional uses shall be permitted in the R-3 Zone:

- (a) Buildings and structures, public and quasi-public, and uses of a recreational, educational, religious, cultural, or public service type, but not including corporation yards, storage or repair yards, and warehouses;
- (b) Communication equipment buildings;
- (c) Foster homes, day nurseries, nursery schools, and day care centers;
- (d) Guest houses;
- (e) Home occupations;
- (f) Mobile home parks with a maximum density of ten (10) units per gross acre, subject to the further requirements set forth in Section 8-2.2404 of Article 24 of this chapter;
- (g) Nursing homes, licensed;
- (h) Offices, professional, including offices for:
 - (1) Accountants;
 - (2) Architects;
 - (3) Attorneys;
 - (4) Chiropodists;

- (5) Chiropractors;
- (6) Dentists;
- (7) Engineers;
- (8) Insurance agents;
- (9) Opticians;
- (10) Optometrists;
- (11) Osteopaths;
- (12) Physicians;
- (13) Real estate brokers; and
- (14) Surgeons;

(i) Off-street public parking areas on sites contiguous to non-residential zones, subject to the provisions of Article 25 of this chapter;

(j) Rooming houses and boardinghouses for any number of guests;

(k) Schools, private, with organized classes, including music schools and dance studios;

(l) Social halls, lodges, fraternal organizations, and clubs, except those operated for a profit; and

(m) Temporary tract offices.

Article 11. Apartment-Professional Zone (R-4)**Sec. 8-2.1101. Purpose (R-4).**

The purpose of the Apartment-Professional Zone (R-4) shall be to provide areas within which protective regulations will create an attractive environment for the compatible combination of multiple-family dwellings and professional and administrative office developments, together with community facilities and services appurtenant thereto.

Sec. 8-2.1102. Principal permitted uses (R-4).

The following principal uses shall be permitted in the R-4 Zone:

- (a) Buildings and structures, public and quasi-public, and uses of a recreational, educational, religious, cultural, or public service type, including communication equipment buildings, but not including corporation yards, storage or repair yards, and warehouses;
- (b) Clinics, medical;
- (c) Foster homes, day nurseries, nursery schools, and day care centers;
- (d) Dwellings, single-family, duplex, and multiple-family;
- (e) Nursing homes, licensed;
- (f) Offices, administrative, executive, business, editorial, and professional;
- (g) Rooming houses and boardinghouses for any number of guests;
- (h) Schools, private, with organized classes, including music schools and dance studios; and
- (i) Social halls, lodges, fraternal organizations, and clubs, except those operated for a profit.

Sec. 8-2.1103. Accessory uses (R-4).

The following accessory uses shall be permitted in the R-4 Zone:

- (a) Pets, household;
- (b) Signs as provided in Section 8-2.2406 of Article 24 of this chapter; and
- (c) Other accessory uses and accessory buildings customarily appurtenant to a permitted use.

Sec. 8-2.1104. Conditional uses (R-4).

The following conditional uses shall be permitted in the R-4 Zone:

- (a) Home occupations;

(b) Mobile home parks with a maximum density of twelve (12) units per gross acre, subject to the further requirements set forth in Section 8-2.2404 of Article 24 of this chapter;

(c) Off-street parking areas for uses not located on the premises, subject to the provisions of Article 25 of this chapter; and

- (d) Temporary tract offices.

...

Article 24. General Provisions**Sec. 8-2.2401. Purpose: Application.**

The purpose of this article is to provide for the necessary special provisions and regulations which are not otherwise set forth in this chapter. Whenever conflicts occur between the provisions of this article and other provisions of this chapter, the provisions of this article shall apply.

Sec. 8-2.2402. Additional permitted uses.

In addition to the uses set forth in Articles 4 through 21 of this chapter the following uses shall be permitted in certain zones:

- (a) Crop and tree farming shall be permitted uses in all zones.

...

Article 27. Site Plan Approval**Sec. 8-2.2701. Purpose.**

The purpose of site plan approval shall be to determine compliance with the provisions of this chapter.

Sec. 8-2.2702. Required for certain buildings and uses.

Approval of the proposed plot plan or use shall be obtained in the following instances:

- (a) For the establishment or change of use of any land, building, or structure, including all uses of agriculturally-zoned land requiring a use permit; and

(b) For the construction, erection, enlargement, alteration, or moving of any building or structure, including farm residences; provided, however, no such approval shall be required for the growing of field, garden, or tree crops or for general farming operations.

Sec. 8-2.2703. Applications.

Applications for site plan approval shall consist of a statement of the proposed use and a plot plan showing the following:

- (a) Lot lines;
- (b) The adjoining or nearest roads;
- (c) The locations and dimensions of pertinent existing improvements;
- (d) The locations and dimensions of proposed improvements; and
- (e) Any other dimensions and data necessary to show that yard requirements, parking requirements, loading requirements, use requirements, and all other provisions of this chapter are fulfilled.

Sec. 8-2.2704. Departmental action.

(a) *Building Inspection Department.* If the Building Inspection Department determines that the proposed use and/or site plan is in conformance with the requirements of this chapter, it shall approve the same.

(b) *Planning Department.* When the Building Inspection Department finds reasonable doubt to exist in interpreting the conformity of an application for site plan approval to the requirements of this chapter, it may refer the application to the Planning Department which shall approve, conditionally approve, or disapprove such application or set the same on the agenda of the Commission for interpretation and determination.

Sec. 8-2.2705. Expiration.

Whenever the proposed use and/or site plan has been approved, and no such use has been initiated within one year after the date of such approval, the approval shall thereupon become null and void.

Sec. 8-2.2706. Appeals.

Any determination relating to a proposed use or site plan by the Planning Director, Planning Department, Building Inspection Department, or any other County department or official may be appealed to the Commission. Such appeal shall be submitted by an application in writing and shall be acted upon by the Commission at its next regular meeting. The determination of the Commission may be appealed to the Board of Supervisors in like manner.

Article 28. Use Permits

Sec. 8-2.2801. Purpose.

The purpose of a use permit shall be to allow the proper integration into the community of uses which may be suitable only in specific locations in a zone or only if such uses are designed or laid out on the site in a particular manner.

Sec. 8-2.2802. Applications: Filing: Fees.

(a) Applications for use permits shall be filed by the owner or his authorized agent in the office of the Planning Department, on forms provided by the Planning Department, at least forty-five (45) days prior to the meeting date on which action may be desired. Such applications shall be accompanied by a fee in the amount of Twenty-Five and no/100ths (\$25.00) Dollars and by a plot plan and any other drawings or information as may be required to fully describe the request.

(b) No application may be filed which proposes any use which is not consistent with the General Plan of the

County as amended. The rejection of applications on the basis of inconsistency may be appealed as provided in Section 8-2.2706 of Article 27 of this chapter.

* * *

Sec. 8-2.2803. Applications: Hearings.

Within sixty (60) days after the date of filing an application for a use permit, the Board of Zoning Adjustment shall hold a public hearing on the requested use permit, notice of which shall be given by mail as provided in Sections 65900 through 65905 of Article 3 of Chapter 4 of Title 7 of the Government Code of the State.

**Sec. 8-2.2804. Board of Zoning Adjustment action:
Granting: Conditions.**

The Board of Zoning Adjustment may approve, conditionally approve, or disapprove an application for a use permit. If it approves such permit, it may attach such conditions, including time limitations and guarantees, as may be necessary to accomplish the objectives set forth in this chapter.

In granting a use permit, the Board of Zoning Adjustment, with due regard to the nature and condition of all adjacent structures and uses, the zone within which the same are located, and the Master Plan, shall find the following general conditions to be fulfilled:

- (a) The requested use is listed as a conditional use in the zone regulations or elsewhere in this chapter;
- (b) The requested use is essential or desirable to the public comfort and convenience;
- (c) The requested use will not impair the integrity or character of the neighborhood nor be detrimental to the public health, safety, or general welfare;
- (d) The requested use will be in conformity with the Master Plan; and
- (e) Adequate utilities, access roads, drainage, sanitation, and/or other necessary facilities will be provided.

* * *

Sec. 8-2.2807. Appeals: Fees: Hearings.

The Board of Zoning Adjustment action on the use permit shall be final unless, within fifteen (15) days after the action by the Board of Zoning Adjustment, the applicant or any other person aggrieved shall appeal therefrom, in writing, to the Board of Supervisors by presenting such appeal, together with an appeal fee in the amount of Fifteen and no/100ths (\$15.00) Dollars, to the County Clerk-Recorder. At its next regular meeting after the filing of such appeal with the County Clerk-Recorder, the Board of Supervisors shall set a date for a hearing thereon and shall give notice thereof to the appellant, the use permit applicant, and the Board of Zoning Adjustment at least five (5) days prior to the date of such bearing.

Article 29. Variances

Sec. 8-2.2901. Purpose.

The purpose of a variance is to allow variation from the strict application of the provisions of this chapter where special circumstances pertaining to the physical characteristics and location of the site are such that the literal enforcement of the requirements of this chapter would involve practical difficulties or would cause hardship and would not carry out the spirit and purposes of this chapter.

Sec. 8-2.2902. Applications: Filing: Fees.

(a) Applications for variances shall be filed by the owner or his authorized agent in the office of the Planning Department at least forty-five (45) days prior to the meeting date on which action may be desired. Such applications shall be accompanied by a fee in the amount of Twenty-Five and no/100ths (\$25.00) Dollars and by a plot plan and any other drawings or information as may be required to fully describe the request.

(b) No application may be filed which proposes any use which is not consistent with the General Plan of the County, as

amended. The rejection of applications on the basis of inconsistency may be appealed as provided in Section 8-2.2706 of Article 27 of this chapter.

Sec. 8-2.2903. Applications: Hearings.

Within sixty (60) days after the date of filing an application for a variance, the Board of Zoning Adjustment shall hold a public hearing on the requested variance, notice of which shall be given by mail as provided in Sections 65900 through 65905 of Article 3 of Chapter 4 of Title 7 of the Government Code of the State.

**Sec. 8-2.2904. Board of Zoning Adjustment action:
Granting: Conditions.**

The Board of Zoning Adjustment may approve, conditionally approve, or disapprove an application for a variance. If it approves such variance, it may attach such conditions, including time limitations and guarantees, as may be necessary to accomplish the objectives set forth in this chapter.

The Board of Zoning Adjustment shall grant a variance only when, in accordance with the provisions of Sections 65900 through 65905 of Article 3 of Chapter 4 of Title 7 of the Government Code of the State, all of the following circumstances are found to apply:

(a) That any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which the subject property is situated;

(b) That, because of special circumstances applicable to the subject property, including size, shape, topography, location, or surroundings, the strict application of the provisions of this chapter is found to deprive the subject property of privileges enjoyed by other properties in the vicinity and under the identical zone classification; and

(c) That the granting of such variance will be in harmony with the general purpose and intent of this chapter and will be in conformity with the Master Plan.

Sec. 8-2.2905. Validity.

No variance which has been approved by the Board of Zoning Adjustment shall become valid prior to the expiration of the appeal period, as set forth in Section 8-2.2907 of this article, or the final action on an appeal to the Board of Supervisors.

Sec. 8-2.2907. Appeals: Fees: Hearings.

The Board of Zoning Adjustment action on the variance shall be final unless, within fifteen (15) days after the action by the Board of Zoning Adjustment, the applicant or any other person aggrieved shall appeal therefrom, in writing, to the Board of Supervisors by presenting such appeal, together with an appeal fee in the amount of Fifteen and no/100ths (\$15.00) Dollars, to the County Clerk-Recorder. At its next regular meeting, after the filing of such appeal with the County Clerk-Recorder, the Board of Supervisors shall set a date for a hearing thereon and shall give notice thereof to the appellant, the variance applicant and the Board of Zoning Adjustment at least five (5) days prior to the date of such hearing.

Article 30. Amendments

Sec. 8-2.3001. Authority.

The provisions of this chapter may be amended by changing the boundaries of zones or by changing any provisions of this chapter whenever the public necessity, convenience, and general welfare require such amendments.

Sec. 8-2.3002. Initiation.

An amendment may be initiated by:

(a) One or more owners of property affected by the proposed amendment or by the authorized agent of any such owner;

- (b) The Board of Supervisors; or
- (c) The Commission.

Sec. 8-2.3003. Applications: Filing: Fees.

(a) Applications of one or more property owners, or the authorized agent thereof, for amendments shall be filed in the office of the Planning Department, on forms provided by the Planning Department, at least forty-five (45) days prior to the meeting date on which action may be desired. Such applications shall be accompanied by a fee in the amount of Fifty and no/100ths (\$50.00) Dollars and by such other information as may be required to fully describe the request.

(b) No application may be filed which proposes any use which is not consistent with the General Plan of the County as amended. The rejection of applications on the basis of inconsistency may be appealed as provided in Section 8-2.2706 of Article 27 of this chapter.

(c) Applications involving projects for which Negative Declarations or Environmental Impact Reports are required shall not be heard until the environmental assessment procedures set forth in Chapter 1 of Title 10 of this Code are satisfied. Applications continued to an unspecified time awaiting submission of additional environmental information by the applicant pursuant to the said provisions of Title 10 shall be deemed denied if the required information is not submitted within one year after the date of filing the application.

Sec. 8-2.3004. Commission hearings: Notice.

Pursuant to the provisions of Chapter 4 of Title 7 of the Government Code of the State, within sixty (60) days after the date of filing, the Commission shall hold a public hearing on the application for an amendment. Notice of the time, place, and purpose of such hearing shall be given at least ten (10) days before the hearing in the following manner:

- (a) by at least one publication in a newspaper of general circulation in the County;
- (b) Wherever practical, by mailing a notice, postage prepaid, to the owners of all property within 300 feet of the

exterior boundaries of the property involved, using for such purpose the last known name and address of such owners as shown upon the last assessment roll of the County; and

(c) When deemed appropriate, the Commission may also give notice by posting notices not more than 500 feet apart along each and every street upon which the property abuts for a distance of not less than 300 feet in each direction from the exterior limits of such property.

Sec. 8-2.3005. Commission action.

Pursuant to the provisions of Chapter 4 of Title 7 of the Government Code of the State, if, from the facts presented at the public hearing provided for in Section 8-2.3004 of this article and by investigation, the Commission finds that the public health, safety, and general welfare warrant the change of zones or regulations, and such change in zones or regulations is in conformity with the Master Plan, the Commission may recommend such change to the Board of Supervisors. If the facts do not justify such change, the Commission shall recommend to the Board that the application be denied. Any recommendation submitted to the Board by the Commission shall be accompanied by a written report of findings and a summary of the hearing.

Sec. 8-2.3006. Board hearings: Notices.

Pursuant to the provisions of Chapter 4 of Title 7 of the Government Code of the State, at its next regular meeting after the receipt of the Commission recommendation concerning an amendment, the Board of Supervisors shall set a date for a hearing thereon. The giving of notice shall be as set forth in Section 8-2.3004 of this article for hearings by the Commission.

Sec. 8-2.3007. Board action.

Pursuant to the provisions of Chapter 4 of Title 7 of the Government Code of the State, the Board of Supervisors shall act on zoning amendments as follows:

- (a) *Decisions in conformance with Commission recommendations.* In order to amend the provisions of this

chapter as recommended by the Commission, the Board shall find that the public health, safety, and general welfare warrant the change of zones or regulations and that such change is in conformity with the Master Plan.

(b) *Decisions not in conformance with Commission recommendations.* If the Board proposes to adopt an amendment to the provisions of this chapter in a form altered from the amendment as recommended by the Commission, or an amendment where denial has been recommended by the Commission, the Board shall not make a change in any amendment thereto recommended by the Commission until the proposed change has been referred to the Commission for a report and a copy of the report has been filed with the Board. The Commission shall submit such report within forty (40) days after the date of referral.

APPELLANT'S BRIEF

No. 84-2015

Supreme Court, U.S.

FILED

DEC 19 1985

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES,
A Partnership,

Appellant,

v.

THE COUNTY OF YOLO and THE
CITY OF DAVIS,

Appellees.

On Appeal From the Court of Appeal of California

**BRIEF FOR APPELLANT
MacDONALD, SOMMER & FRATES**

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December 19, 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does action by a city and county constitute a taking under the Fifth and Fourteenth Amendments of the Constitution when the city and county have:

(a) Restricted property to agricultural use while acknowledging that the property is agriculturally impaired;

(b) Denied all street access to the property from existing, developed public streets by refusing to permit connection to the property;

(c) Deprived the property of the benefit of sanitary sewage disposal service, although the owner and its predecessors have paid some \$75,000 in assessments for such services for many years to a district (that includes the property) established by the city and county to provide such service for residential use;

(d) Refused to provide fire and police protection services to the property, although such services could be provided for less than the tax revenues generated from the proposed development;

(e) Disapproved a development plan of the property which was consistent with and in compliance with the residential zoning of the property and the uses on adjacent properties;

(f) Stated that no use of the property other than agricultural use would be allowed, and acted to carry out that policy, thus rendering any further development applications futile; and

(g) Denied the property owner of all economically viable use of its land?

2. When land use regulations are found to effect a taking, does the Fifth Amendment require that the property owner receive just compensation, or is the property owner limited to relief invalidating the regulations as applied to the property?

3. Do the regulatory actions of a city and county, imposed under color of state law, that deprive an owner of all economic use of its land without just compensation, deny the owner rights protected under 42 U.S.C. § 1983?

LIST OF PARTIES

The caption of the case in this Court names all parties to the proceeding in the Court of Appeal of the State of California.

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No. 84-2015

IN THE

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OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES,
A Partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE
CITY OF DAVIS,
Appellees.

On Appeal From the Court of Appeal of California

BRIEF FOR APPELLANT
MacDONALD, SOMMER & FRATES

OPINIONS BELOW

On October 5, 1982, Appellant MacDonald, Sommer and Frates, a partnership ("Owner"), appealed to the California Court of Appeal, Third Appellate District, from a judgment of the Superior Court of California, County of Yolo, dismissing the case after sustaining a demurrer to its fourth amended complaint (the "Complaint") without leave to amend. JA 121. The Court of Appeal filed its unpublished opinion affirming the judgment on January 24, 1985. JA 125-36. Owner sought review before the California Supreme Court by timely petition

Note: In all quoted material footnotes are omitted and emphasis is ours unless otherwise stated. In citations to the record we refer to the Joint Appendix as "JA"; the Clerk's Transcript on Appeal as "CTA"; the Supplemental Clerk's Transcript on Appeal as "CTA Supp."; the Reporter's Transcript on Appeal as "RTA"; and the Jurisdictional Statement as "JS".

for hearing. The petition was denied by order dated April 3, 1985. JS Appendix ("App.") B. With that order the proceedings became final in the California state courts.

A Notice of Appeal to this Court was filed with the California Court of Appeal on June 25, 1985. JS App. C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(2).

This Court has taken jurisdiction on appeal to review state court judgments concerning regulatory takings of private property without just compensation in: *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (hereinafter "*San Diego*"); *Agins v. City of Tiburon*, 447 U.S. 255 (1980)¹; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) ("*Penn Central*"); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

[N]or shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹ Affirming on other grounds *Agins v. City of Tiburon*, 24 Cal. 3d 166, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). We refer to the California Supreme Court opinion herein as "*Agins I*" and the opinion of this Court as "*Agins II*."

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Pertinent California statutes are the California Planning and Zoning Law (Cal. Gov't Code §§ 65000-65993 (Deering 1979 and Supp. 1985) and the California Subdivision Map Act (Cal. Gov't Code §§ 66410-66499.37 (Deering 1979 and Supp. 1985)) of which the following sections are directly relevant: Cal. Gov't Code §§ 65100, 65300, 65300.5; 65300.7; 65301; 65800; 65804; 65852; 65860(a), (b) and (c); 65906; 66411; 66413(a); 66424; 66424.5; 66426; 66474; 66499.32; 66499.33; 66499.34 (Deering 1979 and Supp. 1985). Appendix A contains the portion of those sections that apply here.

STATEMENT OF THE CASE

This case comes up on the pleadings.² The California trial court sustained a general demurrer to Owner's Complaint, without leave to amend, and entered a judgment of dismissal. JA 121. The facts alleged in the Complaint are therefore taken as true and construed in favor of Owner.³ Those facts are

² At the insistence of Yolo County and Davis, the Chronological List Of Relevant Docket Entries in the Joint Appendix designates (and the Joint Appendix contains) documents that are "unnecessary for the determination of the issues presented" (S. Ct. Rule 30.3) in a case decided on a pleading motion. Appellees' designations appear to be an undisguised attempt to direct this Court's attention to extraneous matters in order to create the impression that the procedural and factual settings of this case are complex. The Complaint demonstrates otherwise.

³ E.g., *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 922, 702 P.2d 503, 509, 216 Cal. Rptr. 345, 351 (1985); *Brousseau v. Jarrett*, 73 Cal. App. 3d 864, 870-71, 141 Cal. Rptr. 200, 204 (1977). The California demurrer procedure thus corresponds to a motion to dismiss under F.R. Civ. P. 12(b)(6) in federal courts. See *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

supplemented by matters of which the courts below took judicial notice at Owner's request.⁴

In 1971 Owner bought a 44-acre parcel (the "Property") in Yolo County, California, next to but outside of the City of Davis. JA 43 ¶ 6. Davis and Yolo County are just west of Sacramento, along the main route (Interstate 80) to San Francisco. Davis is best known as the location of one of the campuses of the University of California. The Davis region has a severe shortage of all types of housing, and particularly of single-family detached houses. JA 44 ¶ 10.

The Property is illustrated in the photograph which is Appendix B of this brief.⁵ Since 1966 Yolo County has designated the Property for single-family and multi-family residential use on its general plan and zoning ordinances. JA 44 ¶ 8. The County included the Property in the local sewer district in 1961 (JA 46-47 ¶ 15), and Owner has paid some \$75,000 in assessments (JA 48 ¶ 19) over the years for expected sewer service. In 1972 through 1974 Davis and Yolo County sought grant money from the U. S. Environmental Protection Agency to help finance sewer improvements by representing in the grant application that the Property would be developed for residential use. JA 46-48 ¶¶ 14-19.

The Property abuts other land devoted to residential use, and still more housing lies nearby. JA 44 ¶ 9. It has no peculiar

⁴ JA 126 n.1; RTA 105-36. Yolo County and Davis also requested judicial notice of several matters, but their requests were not granted. JA 126 n.1. In California practice a court ruling on a demurrer may consider judicially noticed matter as well as the facts alleged in the complaint. Cal. Civ. Proc. Code § 430.30(a) (Deering 1972). California courts may take judicial notice of the existence and content of public records, but not of the truth of factual assertions made therein, e.g., *Cruz v. County of Los Angeles*, 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661 (1985); *Beckley v. Reclamation Board*, 205 Cal. App. 2d 734, 741-42, 23 Cal. Rptr. 428, 433-34 (1962), unless the material falls within an exception to the hearsay rule. E.g., compare *Williams v. Hartford Ins. Co.*, 147 Cal. App. 3d 893, 899, 195 Cal. Rptr. 448, 452 (1983) with *Dwan v. Dixon*, 216 Cal. App. 2d 260, 265, 30 Cal. Rptr. 749, 752 (1963).

⁵ Appendix B is the photograph judicially noticed below (RTA 119) and reproduced at JA 7, with additional labels for roads, parcels, city boundaries, etc.

features that would inhibit residential development. JA 44 ¶ 8. It is, in short, perfect for housing. JA 44-46 ¶¶ 10, 12-13.

Relying upon Yolo County's apparent willingness to allow, indeed facilitate, residential use, Owner applied in 1975 for approval of a subdivision map. JA 49 ¶ 20. This is the essential step required for residential development under California's Subdivision Map Act⁶, which closely regulates development of land in California. The application complied in all respects with the zoning ordinance, general plan and other applicable laws. JA 49 ¶ 20. The map proposed 159 lots (*id.*) for single-family and multi-family housing.⁷ Owner also offered to dedicate a large portion of an adjoining parcel it owned (the "Connecting Property") to extend a major, 80-foot wide traffic artery, Cowell Boulevard, to the Property at Owner's expense, or alternatively, develop it as a private street. JA 43 ¶ 7; 45 ¶ 12; see map at JA 67.

By 1975, however, Davis had adopted an "anti-growth" policy both for its own territory and for other lands like the Property that were within its "sphere of influence."⁸ JA 47 ¶ 17. Davis adopted policies to prevent any development of the Property. JA 46 ¶¶ 14, 49-50 ¶ 21. It said it designated the Property "Agricultural Preserve" and later "Agricultural Re-

⁶ Cal. Gov't Code §§ 66410 *et seq.* (Deering 1979 and Supp. 1985), referred to herein as "SMA". The SMA grants local governing bodies broad discretion to reject subdivision applications even though they comply with that jurisdiction's own general plan and zoning ordinances. See, e.g., Cal. Gov't Code §§ 66473, 66474(c), (d), (e), (f) and (g) (Deering 1979 and Supp. 1985).

⁷ The proposed map is reproduced at JA 67.

⁸ California law authorizes cities to adopt a general plan for "any land outside its boundaries which . . . bears relation to its planning", Cal. Gov't Code § 65300 (Deering Suppl. 1985), and to adopt zoning ordinances for such land, Cal. Gov't Code § 65859 (Deering Supp. 1985). Such general plan and zoning ordinance provisions for areas outside boundaries of the enacting jurisdiction have no legal effect in and of themselves, except as indications of how the City will plan for use of the subject land if annexation occurs and if the City does not change its mind. Where a city plan and county plan for the same property are in conflict, the county plan controls so long as the property remains outside of the city's boundaries. The county has the discretion to follow the city plan, however, as Yolo County did in this case.

serve" on its general plan. JA 49 ¶ 21(a).⁹ Davis and Yolo County, acting under a joint management agreement, altered the sewer service area borders and cut the Property off from service. JA 47 ¶¶ 16-17; 123, 126 n.l. Davis refused to allow Owner's proposed Cowell Boulevard extension to be connected with the existing street. JA 49-50, 84. In response to the subdivision application, it required other proposed streets near the Property to be redesigned to cut off potential access to the Property. JA 49-50 ¶ 21; 123, 126 n.l.¹⁰ Davis announced it would refuse to accept dedication of any public facilities (to be built at no cost to Davis), or annexation, or other arrangements to provide services to the Property (*id.*).¹¹

Davis's ostensible reason for its opposition to housing on the Property was its policy of preserving "prime agricultural lands" (*id.*). There is no small irony in that description. The Property is unfit for agricultural use. Before Owner bought the Property its topsoil had been gouged away to the depth of several feet, under threat of state condemnation, and used to build nearby Interstate 80. JA 45 ¶ 11. What soil remains is infested with crop-destroying pests (*id.*). They cannot be economically controlled because *the adjacent houses* make it impossible to use crop-dusting planes or other efficient means of pesticide application (*id.*; see photo App. B hereto). There is no agricultural use from which Owner can derive any economic return. JA 45 ¶ 11; 51-52 ¶¶ 25-26. The only agricultural "use" that remains is the "right" to farm the Property at a loss. *Id.*

⁹ The Davis Area General Plan defines "Agricultural Preserve" as (CTA 1506):

A prescribed area within which the use of land may be restricted to open space, agricultural or compatible use

¹⁰ The Court of Appeal took judicial notice of the fact that Davis conditioned approval of a subdivision of the Connecting Property upon Owner cutting off access to the Property, and of the fact that "[a]pproval of subdivision by City of Davis on property belonging to a third party adjacent to subject property was conditioned upon the party's development of a plan that would cut off easement for access to the subject property." JA 123 and 126 n.l.

¹¹ Under the Subdivision Map Act a subdivider can be required to install all "off-site" improvements (streets, storm drains, services, etc.) and dedicate all required easements at the subdivider's expense. See, e.g., Cal. Gov't Code §§ 66419, 66473, 66462 (Deering 1979 and Supp. 1985); *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

Davis' purported designation of the Property as "Agricultural Reserve" was, in reality, an "open space" designation. JA 49-50 ¶ 21. Yolo County admitted as much when it conceded that the Property was "agriculturally impaired." JA 51 ¶ 24. Davis sought to prevent development in order to restrict the Property to an open-space buffer for the benefit of Davis and its citizens at no cost to them. JA 49-50 ¶ 21; 60 ¶ 33.

Yolo County's Planning Commission denied Owner's subdivision application and, on appeal, its Board of Supervisors affirmed that denial on June 14, 1977. JA 51 ¶ 23. But the Board did more than just deny the map; *it determined that the Property could only be used for agricultural purposes.* JA 51 ¶ 24. The decision was purportedly based on "lack of services", i.e. the sewer service Owner paid for but Davis and Yolo County denied, lack of the access that Davis had blocked, and lack of police and fire services that would cost less than the taxes the Property would generate to pay for them. JA 45-46 ¶ 12.¹² In net effect, the Board based its decision on Davis' determination to block access and provision of public services to the Property in order to further its open space policies. JA 51-52 ¶ 25; see also JA 84. Yolo County adopted the planning policy of Davis to restrict the Property to agricultural uses, and deny any other use to Owner. JA 51 ¶ 24.

Yolo County has also adopted a general plan policy of refusing to permit development except within cities (JA 50); of course the only city around, Davis, will not annex the Property to allow development of it. JA 50 ¶ 21(d). Any application for a non-agricultural use—another residential map, a zone change, variance, or other such relief—would consequently be futile. JA 58 ¶ 26. The "agricultural uses" to which Yolo

¹² If Yolo County had based its action on the unavailability of services or facilities essential to serve residential development (residential development being the preferred use), the proper action would have been to approve the tentative map, conditioned upon the subdivider's ability to establish the existence of necessary services as a condition to approval of the final map. This procedure is expressly contemplated by the SMA and is the most efficient and orderly method of proceeding since it establishes for the subdivider, the public agencies, and the public the exact conditions which must be fulfilled in order to implement a residential use. See Cal. Gov't Code §§ 66426 *et seq.* (Deering Supp. 1985).

County restricted the Property—as the Complaint alleges in painful detail—are not economically viable. JA 52-58. Yolo County and Davis thus effectively deprived Owner of the entire economic use of the Property. JA 51 ¶¶ 23-24. Its value is zero. JA 61 ¶ 37.

The Yolo County Board order of June 14, 1977 exhausted administrative review. JA 51 ¶ 23. On October 13, 1977 Owner filed this action (CTA 1).¹³ On July 21, 1982 the trial court sustained demurrers to the Complaint without leave to amend (JA 109), and entered judgment of dismissal on August 19, 1982. JA 121. Owner appealed to the California Court of Appeal for the Third Appellate District (CTA 1689), which filed its opinion affirming the judgment on January 24, 1985. JA 125-36. The Court of Appeal held that Owner was not entitled to money damages under *Agins I*. As an alternative holding, it found that Owner had failed to state a case for a taking. JA 132-33.

The Supreme Court of California denied a hearing on April 3, 1985. JS App. B. Owner docketed a timely appeal in this Court on June 28, 1985. This Court noted probable jurisdiction on October 21, 1985.

SUMMARY OF ARGUMENT

A. The Complaint Establishes That Yolo County And Davis Have "Taken" The Property

Land use regulations that deprive an owner of all economic beneficial use of his property, or of all reasonable investment-backed expectations in it, constitute takings of the property under the Fifth and Fourteenth Amendments of the U.S. Constitution. The regulations imposed by Yolo County and Davis in this case have those effects upon the Property.

¹³ It also filed, as a separate case, a petition for writ of mandate to set aside the Board's decision (*see* JA 21). Owner moved to consolidate this case with the writ proceeding (CTA 79); Davis and Yolo County opposed (*id.* at 93, 109), and consolidation was denied by order filed February 24, 1978 (*id.* at 240).

In *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984), this Court held that the existence of a taking should be determined on the basis of three factors: the character of the governmental action, its economic impact upon the property owner and its effect upon the property owner's reasonable investment-backed expectations.

In this case, the governmental action consists of the imposition of regulations to restrict the Property to open space for the benefit of the citizens of Davis. Owner suffers the economic impact of complete loss of all viable use. It is thus deprived of the reasonable investment-backed expectations derived from the residential planning and zoning for the Property when Owner bought it (continued to the present day), the nature and use of the surrounding land, and Owner's payment of sewer and other assessments during the period of its ownership. The regulations relegate Owner to a zero or negative return on its investment.

Deprivation of access by Davis also constitutes a taking of a property interest. The right of access to adjacent public streets is a protected incident of ownership. Governmental interference with it by direct or indirect physical interdiction or by regulation constitutes a taking for which just compensation must be paid.

B. The Proper Remedy For A Regulatory Taking Is Just Compensation

Once there has been a taking for public use, just compensation must be paid. The clear language of the Fifth Amendment so requires, and this Court has consistently held that compensation rather than invalidation is the preferred remedy.

Restriction of a property owner to a remedy of invalidation in the case of a taking does not constitute "just compensation." Since the courts lack the power to order approval of a project, a decree of invalidation simply requires further proceedings before the same body which deprived the Owner of its constitutional rights in the first place.

Any supposed "chilling effect" on the exercise of governmental power due to damage awards is irrelevant. Government may not violate constitutional rights on the excuse that it would be too costly to respect them. The "chilling effect" claim, moreover, has no application to a situation where a governing body applies regulations in a quasi-adjudicative proceeding with full knowledge of their effect. The California Supreme Court, which adopted the "chilling effect" argument as holding in *Agins I*, has demonstrated in the physical invasion inverse condemnation cases that it does not take the argument seriously. In such cases, it has taken strict liability to the most tenuous limits of causation. Even though the liability in such cases is unforeseeable, the Court has imposed no limitations on the basis of fear that such liability will impose a chilling effect upon construction of public improvements.

Having alleged facts sufficient to establish a taking, Owner is entitled to its day in court to prove them and an award of just compensation from a jury as its remedy.

C. Owner Has Alleged A Violation Of 42 U.S.C. § 1983

The Complaint contains the allegations required to state a cause of action under 42 U.S.C. § 1983. Owner has alleged that Yolo County and Davis have deprived it of federal constitutional rights acting under color of state law. Nothing more is required. JA 59 ¶ 31, 60 ¶ 33.

State courts have jurisdiction to hear claims of violation of 42 U.S.C. § 1983, and the California courts acted erroneously when they refused to entertain Owner's case.

D. This Case Is Ripe For Decision. No Further Action Is Required By Owner To Establish How The Regulations Are Applied To The Property

The administrative decision in this case has been formalized and its effects felt in a concrete way. The administrative decision is final and it has been made final under circumstances and conditions that demonstrate that any other application for a viable use would be futile.

The economic effect of the administrative decision is also clear. It deprives Owner of all economically viable use of its land and all of its reasonable investment-backed expectations.

Although Yolo County denied Owner's specific subdivision proposal, it did so on grounds equally applicable to any other proposal for a use inconsistent with Davis's "Agricultural Reserve" designation—which here means no use. JA 51 ¶ 24, 58 ¶ 26.

No further administrative proceedings are required in order to demonstrate the manner in which the regulations have been or will be applied to the Property. In any case, Owner is not required to exhaust administrative remedies in order to state a case under 42 U.S.C. § 1983.

E. The Recent Cases In Which This Court Has Failed To Find A Taking Are Readily Distinguishable From This Case

This case is distinguishable from *Penn Central*, *Agins II*, *San Diego* and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108 (1985) ("*Hamilton Bank*"). The property owner in *Penn Central* conceded that it was left with a reasonable use. In the other cases, the Court failed to reach the merits for reasons not germane here.

ARGUMENT

A. The Complaint Establishes That Yolo County and Davis Have "Taken" The Property By Actions That Prohibit All Economically Viable Use And Deprive Owner Of Its Reasonable Investment-Backed Expectations

1. The Regulatory Restriction Of The Property To Open Space Constitutes A Taking

The Fifth Amendment states:

[N]or shall private property be taken for public use, without just compensation.

The Fifth Amendment applies to the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); see *Chicago, B.&Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 241 (1897).

It is now well established that a regulation can effect a Fifth Amendment taking. See, e.g., *Hamilton Bank; Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984); *Agins II; PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Central; United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).¹⁴

Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636-61 (1981) (cited herein as "Brennan San Diego opinion") contains a full discussion of this Court's precedents regarding regulatory takings. We will summarize the authorities here.¹⁵

This Court has noted that "[t]here is no set formula to determine where regulation ends and taking begins," *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), and that the determination of when a taking occurs "calls as much for the exercise of judgment as for the application of logic." *Andrus*, 444 U.S. at 65. See, e.g., *Ruckelshaus*, 104 S. Ct. at 2874 ("ad hoc, factual inquiry" must determine when "justice and fairness" require that economic injury by the public be deemed a compensable taking); Brennan *San Diego* opinion, 450 U.S. at 649; *Penn Central*, 438 U.S. at 124 ("ad hoc, factual inquiries"); *United States v. Central Eureka Mining Co.*, 357 U.S. at 168 ("question properly turning upon the particular circumstances of each case"); *Pennsylvania Coal*, 260 U.S. at 416 ("a question of degree—and therefore cannot be disposed of by general propositions").

¹⁴ *Agins II* and *Penn Central* establish that the principle applies to excessively burdensome regulation of land.

¹⁵ See also Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15 (1983). Mr. Bauman is on this brief as of counsel for Owner. Therefore, we do not cite his article as an independent authoritative source, but because it contains a comprehensive, recent collection of the relevant authorities, including those that support Davis and Yolo County (e.g. *id.* at 25-32; 41-44) as well as those that support Owner.

This Court has described the point at which the impact of a regulation becomes a "taking" by the use of varying formulae. A regulation that allowed a "reasonable beneficial use" was not a taking in *Penn Central*, 438 U.S. at 138. The Brennan *San Diego* opinion states that a taking occurs when a regulation deprives a property owner of "all or most" of the viable use of his property, 450 U.S. at 653. *Agins II* (447 U.S. at 260) describes a regulation that constitutes a taking as one that "denies an owner economically viable use of his land" (citing *Penn Central*, 438 U.S. 104, 138, n.36).¹⁶ See also *United States v. Riverside Bayview Homes, Inc.*, 54 U.S.L.W. 4027, 4028-29 n.6 (1985).

In *Ruckelshaus*, 104 S. Ct. at 2875, this Court refined the various formulae into three factors: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations," citing *PruneYard Shopping Center*, 447 U.S. at 83; *Kaiser Aetna*, 444 U.S. at 175; and *Penn Central*, 438 U.S. at 124.¹⁷

Those three factors applied to the facts of this case paint a revealing picture. The "character of the governmental action" in this case is restriction of the Property to open space for the benefit of the citizens of Davis and Yolo County. The economic impact of the regulation is a total "wipe-out" for Owner,¹⁸ in contrast, for example, to *Penn Central* where the property

¹⁶ In contrast, a regulation that deprives the property owner only of the most profitable use of his property is not a taking. *Penn Central*, 438 U.S. at 125. The inquiry addresses use of the property as opposed to the property itself. This Court has stated that the term "property" is not "used in the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." Instead, it denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). Cf. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). See also J. Rawls, *A THEORY OF JUSTICE* 3-4 (1971).

¹⁷ Mr. Bauman's commentary identifies the same three determining factors in a synthesis of the relevant literature. Bauman, *supra* note 15, at 31. See also Michelman, *Property As A Constitutional Right*, 38 Wash. & Lee L. Rev. 1097 (1981).

¹⁸ See generally D. Hagman & D. Misczynski, *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* (1978).

owner was left with a reasonable use of the regulated property as well as compensation in the form of transferable development rights. 438 U.S. at 129.

As to "reasonable investment-backed expectations": The Property was zoned and planned for residential use when Owner bought it. JA 43 ¶ 6, 44 ¶ 8. It is still so zoned and planned on Yolo County's books. It is located in an area of growing residential development. JA 44 ¶ 9. Owner paid substantial sewer assessments to secure sanitary sewer service for residential development on the Property. JA 48 ¶ 19. Yolo County and Davis participated in the sewer service arrangement by applying to the U.S. Environmental Protection Agency in 1972-74 for a grant to construct sewer facilities, supporting their grant application by representations that the Property was part of the area to be developed for residential use and served by the facility for which the grant was sought. JA 48 ¶ 18.

We deal here with more than a "'unilateral expectation or an abstract need.'" *Ruckelshaus*, 104 S. Ct. at 2875, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). This case presents a situation in which the public agencies from which Owner seeks compensation took definitive and precise action over many years to encourage the commitment to residential development that Owner made. JA 44, 46-48. Yolo County and Davis promised to construct public improvements for residential development for the benefit of Owner, reported that promise to an agency of the federal government, and secured money from both on the basis of that promise. *Id.*

Restriction to open space deprives Owner of investment-backed expectations reasonably induced by planning, zoning and service commitments applied to the Property.¹⁹

2. Yolo County And Davis Took A Property Interest When They Deprived The Property Of Access

Both federal and California cases recognize that the ownership of real property includes, as an appurtenant right, the right of access to adjacent or neighboring streets and that

¹⁹ See generally Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977).

deprivation of that access is a taking.²⁰ In *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959), a regulation preventing access by airplane—which was a way of necessity to the property in question—was held to constitute a compensable taking. In *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 151, 583 P.2d 165, 169, 148 Cal. Rptr. 640, 644 (1978) the California Supreme Court observed that "[i]t is settled that substantial impairment of access entitles a landowner to compensation." In *Jones* the county rejected a subdivision application for lack of access, citing an agreement between the state and the county precluding use of certain streets while the state planned for a potential freeway. That denial of street access, held the court, constituted a compensable taking.

Yolo County and Davis denied all street access to the Property. JA 45 ¶ 12. Davis refused to permit Cowell Boulevard's extension to the Property either as a public or private road.²¹ JA 49-50 ¶ 21(c); 84. Davis approved a subdivision map on the adjacent Simmons Parcel conditioned upon cutting off street access to the Property. JA 49 ¶ 21(b). Davis imposed similar conditions with respect to applications for development of the Connecting Property. JA 123, 126 n. 1. Yolo County then relied upon Davis's denials of street access in rejecting Owner's subdivision application. JA 51 ¶ 25. The same sort of conduct was condemned in *Jones*, 22 Cal. 3d at 152, 583 P.2d at 170, 148 Cal. Rptr. at 645:

²⁰ See *United States v. Welch*, 217 U.S. 333 (1910); *United States v. Smith*, 307 F.2d 49 (5th Cir. 1962); *Stoebeck, The Property Right Of Access Versus The Power of Eminent Domain*, 47 Texas L. Rev. 733 (1969). In *Rose v. California*, 19 Cal. 2d 713, 726-27, 123 P.2d 505, 514 (1942), the California Supreme Court stated:

That the owner of property fronting upon a street or highway has as appurtenant thereto certain private easements in the street in front of or adjacent to the lot—distinguished from the public easements therein—which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself, is not open to question.

...
The abutting owner's easement of access arises as a matter of law....

²¹ Cowell Boulevard is a fully-developed, 80-foot wide Davis street which now ends at the border of Owner's Connecting Property. See map, App. B hereto. The Connecting Property runs from Cowell Boulevard to the Property. *Id.* Two principals of Owner had (and still have) recorded easements of access and rights of way appurtenant to the Property through the Connecting Property to Cowell Boulevard. JA 107; RTA 124.

Here, however, the state went further. It effectively denied plaintiffs the right to subdivide their land by depriving them of the access required for subdivision. Although it was the county which refused to approve plaintiffs' subdivision map providing for access from Fair Oaks Boulevard, the reason given for the refusal was the freeway agreement with the state

The foregoing actions of Davis and Yolo County deprive the Property of all access. That deprivation is a separate and independent ground for a claim that Yolo County and Davis have taken a property interest of Owner, entitling Owner to just compensation.

B. The Proper Remedy For A Regulatory Taking Is Just Compensation

1. The Fifth Amendment Mandates Payment of Compensation

Owner contends that the Brennan *San Diego* opinion properly states the law.²² Regulation depriving a property owner of his reasonable, investment-backed expectation or all

²² The following federal appellate courts agree that just compensation should be awarded for regulatory takings. *Nemmers v. City of Dubuque*, 764 F.2d 502, 504 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir.), cert. denied, 464 U.S. 847 (1983); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). Many state courts also rely on the Brennan *San Diego* opinion and hold that just compensation should be awarded for regulatory taking. *Pioneer Sand & Gravel v. Municipality of Anchorage*, 627 P.2d 651, 652 n.2 (Alaska 1981); *Harris Trust & Savings Bank v. Duggan*, 95 Ill. 2d 516, 449 N.E.2d 69 (1983); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471 (Iowa 1982); *Hamilton v. Conservation Comm'n of Orleans*, 425 N.E.2d 358 (Mass. App. 1981); *Pratt v. State*, 309 N.W.2d 767, 774 (Minn. 1981); *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982); *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981); *Sheerr v. Township of Evesham*, 184 N.J. Super 11, 27-28, 445 A.2d 46, 54 (Law Div. 1982); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982); *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983); and *Zinn v. State*, 112 Wis. 2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983).

economic beneficial use of his property constitutes a taking for which the Just Compensation Clause requires the payment of just compensation.²³ Since regulations by their nature are subject to change, the taking of a property interest for public use may be temporary or permanent depending upon the facts of the case as determined at trial—and the damage award should be structured accordingly.²⁴

The right to just compensation under the Fifth Amendment is self-executing, flowing from the express language of the Amendment itself. Since a damage remedy for civil rights violations has been implied, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and applies whether or not the agency has acted in good faith, *Owen v. City of Independence*, 445 U.S. 622 (1980), the right to just compensation for a violation of the Fifth Amendment taking clause should follow *a fortiori*.

We expand upon the discussion contained in the Brennan *San Diego* opinion only to the extent required to deal with the argument that the right to obtain invalidation of an excessively burdensome regulation is a sufficient remedy and that a compensation remedy would have a "chilling effect" upon legitimate exercises of the police power.

2. Invalidation As The Sole Remedy Does Not Meet Constitutional Requirements; It Does Not Compensate The Property Owner And It Is Not Fair

The Brennan *San Diego* opinion states that invalidation does not compensate the property owner as the Just Compensation Clause requires. 450 U.S. at 656. This Court has

²³ See Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty* in *Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning, and Eminent Domain* 177, 195-206 (1980).

²⁴ In this case, perpetuation of a restriction of the Property to agricultural use would constitute a permanent taking. A change to allow an economic beneficial use would render the taking temporary. The decision lies with the governmental agency—in this case, Yolo County. Brennan *San Diego* opinion, 450 U.S. at 658-59. See MODEL LAND DEV. CODE 155-56, 440 (ALI 1976). See generally Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Calif. L. Rev. 569 (1984).

observed that just compensation, not invalidation, is the preferred remedy for a Fifth Amendment taking. *Ruckelshaus*, 104 S. Ct. at 2880: "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Accord*, *Riverside Bayview Homes*, 54 U.S.L.W. at 4029. As a practical matter, it is also a frequently meaningless remedy.

Many commentators have noted how easily the "right" to invalidation can be frustrated:

[I]nvalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again.²⁵

As the Brennan *San Diego* opinion observes, some prominent local regulators treat invalidation with disdain.²⁶ And the record in California provides powerful circumstantial evidence

²⁵ Kmiec, *Regulatory Takings: The Supreme Court Runs Out Of Gas In San Diego*, 57 Ind. L.J. 45, 51 (1982). *Accord*, Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. Rev. 711, 732-34 (1982).

²⁶ 450 U.S. at 655-56 n.22, quoting James Longtin, a prominent California City Attorney and author of *California Land Use Regulation* (Local Government Publication, 1977), from Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO Municipal Law Review 192-193 (1975):

IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

If legal preventative maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 Cal. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . .

See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.

that the remedy of invalidation simply does not exist, despite its occasional acknowledgment in the language of the opinions.

From 1960 through 1985, the California Supreme Court has published opinions in more than 100 land use regulation cases.²⁷ The Courts of Appeal have decided and published opinions in many times that number. Despite such intense and protracted judicial examination, and despite the fact that a substantial number of these cases deal with the rights of property owners vis-a-vis regulating authorities, we can find only three opinions from the Court of Appeal (none from the California Supreme Court) in which a court has held that an otherwise valid police power regulation was excessively burdensome as to a particular property owner.²⁸ Such a record strongly suggests—if it does not prove—that practical reality belies the theoretical availability of an invalidation remedy.

²⁷ DiMento, *et al.*, *Land Development And Environmental Control In The California Supreme Court: The Deferential, The Preservationist And The Preservationist-Erratic Eras*, 27 U.C.L.A. L. Rev. 859 (1980) studies 93 California Supreme Court opinions in cases decided during the period 1962 through 1980. To those we add *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *prob. juris. noted*, 53 U.S.L.W. 3838 (1985); *Griffin Development Co. v. City of Oxnard*, 39 Cal. 3d 256, 703 P.2d 339, 217 Cal. Rptr. 1 (1985); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985); *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980); *Pardee Construction Co. v. City of Camarillo*, 37 Cal. 3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984); *Santa Monica Pines Ltd. v. Rent Control Board*, 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984); *Yost v. Thomas*, 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984); *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984).

²⁸ In *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), the court held that a property owner was entitled to compensation due to the excessive burden of open space regulation as applied to his property. In *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969), the court held that a property owner was entitled to compensation due to restrictions imposed on the use of her land pending development of an airport plan. Neither result survives *Agins I*. Compare *North Sacramento Land Co. v. City of Sacramento*, 140 Cal. App. 3d 576, 189 Cal. Rptr. 739 (1983), which came up on demurrer. There the court, following *Agins I*, ruled that the plaintiff had alleged a regulatory taking, and allowed plaintiff a trial to prove that the local ordinance left it no reasonable use for its land.

The aggrieved California property owner seeking invalidation of an excessively burdensome regulation faces major substantive and procedural obstacles. First, he must proceed by action in mandamus.²⁹ Mandate may not be employed "to compel a public administrative agency possessing discretionary power to act in a particular manner."³⁰ Even if he wins, the owner has no right to an order compelling the affirmative grant of an approval.³¹ Instead, the successful plaintiff in an action to invalidate an unconstitutionally burdensome restriction is remanded for further discretionary proceedings before the body that violated his constitutional rights in the first place—a body that, in California, knows that no matter what it does, it will not be liable in damages.³² That is the best for which the owner can hope after years of litigation.

The total impotence of invalidation as a remedy in California land use regulation cases deprives it of value as a constitutional remedy. It fails the most fundamental test of fairness.³³ In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Court stated:

²⁹ *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

³⁰ *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 315, 144 P.2d 4, 11 (1943).

³¹ Where the public agency has granted a conditional approval—and the property owner seeks to invalidate an excessively burdensome condition—a successful action does not result in the issuance of the permit stripped of the illegal condition. California courts hold that if a condition is invalid, the local agency must have the right to review its action in its entirety since it might not have granted even conditional approval had it known that the condition could not be enforced. *McLain Western #1 v. County of San Diego*, 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983).

³² The trial of the suit to invalidate is limited for all practical purposes to the administrative record made before the agency from which the appeal is taken. Cal. Civ. Proc. Code § 1094.5 (Deering Supp. 1985). The local agency is entitled to a presumption that its actions are valid. Cal. Evid. Code § 664 (Deering 1979); *Ward v. County of Riverside*, 273 Cal. App. 3d 353, 358-59, 78 Cal. Rptr. 46 (1969). The plaintiff is not entitled to raise on judicial review any issues and arguments not asserted before the administrative agency. *Bohn v. Watson*, 130 Cal. App. 2d 24, 278 P.2d 454 (1954).

³³ Invalidation cannot serve as a legislative substitute for compensation. Where "the Constitution has declared that just compensation shall be paid . . . the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), followed in *Florida Power Corp. v. F.C.C.*, 772 F.2d 1537 (11th Cir. 1985).

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

And again, in *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945):

The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project.³⁴

This Court has consistently held that payment of just compensation is the preferred remedy over decrees of invalidation or equitable relief.³⁵ In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court inferred a right to compensation for civil rights violations in order to provide a

³⁴ See also *Brennan San Diego* opinion, 450 U.S. at 652, 656. Professor Tribe has noted that the compensation requirement is at least "an attempt to limit arbitrary sacrifice of the few to the many." L. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 9-4 (1978).

³⁵ See e.g., *Regional Rail Reorg. Act Cases*, 419 U.S. 102 (1974); *City of Fresno v. California*, 372 U.S. 627 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Kanner*, *supra* note 23, at 195-206. *Regional Rail Reorg. Act Cases* suggests a strong preference for a damage remedy. This line of cases is discussed in Comment. *supra* note 25, at 720 n. 57.

That the Court might even be straining to find a damages remedy is apparent from the dissent in *Regional Rail Cases*, which noted that the statute involved never mentioned a right to a compensatory remedy and which quoted legislative history to the effect that Congress had expressly rejected any such implication. 419 U.S. at 161-85 (Douglas, J., dissenting).

In general the Court has reasoned that it is better for public policy to retain the regulation and leave the aggrieved property owner to his damages suit than to invalidate programs of significant public benefit. *Hurley v. Kincaid*, 285 U.S. at 104. In the same case the Court revealed the inverse condemnation tone of this rationale by observing that the compensation the owner would receive from a damages action "will be the same as that which he might have been awarded had the [government] instituted the condemnation proceeding which it is contended the statute requires." *Id.*

meaningful remedy for damage already inflicted. Those who argue for invalidation as the exclusive remedy in a case such as this must overcome the plain language of the Just Compensation Clause and the strong historical preference of this Court for a compensation remedy as opposed to other forms of relief. Given the impotence of the invalidation remedy, fundamental fairness requires that just compensation be paid when a taking is found.

3. The So-Called "Chilling Effect" Of Damage Awards Upon Public Action Is Both Irrelevant And Spurious

The court in *Agins I* rejected compensation as a remedy for regulatory takings on the grounds that the threat of unanticipated financial liability would have a "chilling effect upon the exercise of . . . regulatory powers" and would result in judicial usurpation of legislative power over fiscal resources. The court concluded that the right to invalidation of the offending restriction provides property owners with a sufficient remedy. 24 Cal. 3d at 276.

We discuss the chilling effect concept within the framework of *Agins I* for two reasons. First, the California Court of Appeal followed *Agins I* in this case—and in so doing, deprived Owner of its constitutional rights. Second, *Agins I* constitutes a definitive espousal of the chilling effect argument by a state supreme court that has considered many land use regulation cases. Thus, the *Agins I* decision and the California decisional backdrop from which it evolved provides a good vehicle for analysis of the concept. Even in such a favorable context, the chilling effect rationale cannot withstand analysis.

(a) The Expense Of Obeying The Constitution Is No Excuse For Violating It

Local governments may not violate constitutional rights on the excuse that it would be too expensive to respect them. "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in

doing so." Brennan *San Diego* opinion, 450 U.S. at 661, citing *Watson v. Memphis*, 373 U.S. 526, 537-38 (1963). See also *Owen v. City of Independence*, 445 U.S. 622 (1980).³⁶

(b) Since Yolo County Deliberately Acted With Full Knowledge Of Owner's Contention, There Can Be No Claim Of "Chilling Effect" On This Record

This record provides a poor vehicle for arguing "chilling effect" in any event. Yolo County and Davis are not confronted here with any sudden or unexpected liability that frustrated legislative policy. In this case Yolo County expressly refused to apply its own zoning policy that would have allowed Owner a use. Instead, it deliberately undertook to apply Davis's policy, in a quasi-adjudicative proceeding, in the face of Owner's express contentions that Davis's policy would be a taking of the Property. See, e.g., JA 51 ¶ 24. Yolo County relegated the Property to agricultural use while conceding that the Property was unsuited for that use. *Id.* It took that step at the conclusion of protracted consideration with full knowledge of its effect. See JA 71-80.

This is not a case where the "'threat of unanticipated financial liability . . . intimidate[d] legislative bodies and . . . discourage[d] the implementation of strict or innovative planning measures . . .'" *Agins I*, 24 Cal. 3d at 276. It is a case where the legislative bodies in question expressly, deliberately and knowingly assumed the very risk for which they now seek to avoid responsibility.

(c) The California Decisions Disregard Chilling Effect In Inverse Condemnation Cases Involving Physical Injury

The California courts have themselves treated the chilling effect argument with disdain in an analogous line of cases. The chilling effect argument was originally advanced as a limitation

³⁶ In a concurring opinion in *Bivens*, Mr. Justice Harlan observed that the "social values" emphasized in the Constitution are more important than preventing fiscal and judicial resources from being stretched further by recognition of a damages remedy for abusive state action. *Bivens*, 403 U.S. at 410-11.

on the right to recover damages in a case where construction of a public improvement invaded or injured private property. *Bacich v. Board of Control*, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943). But in *Albers v. City of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965), the court expanded liability for damages in inverse condemnation to substantially all cases where injury or property damage has occurred as a result of construction of a public work, *whether the injury could reasonably have been foreseen or not*.³⁷ The *Albers* rule has been applied to physical invasions both transitory and ephemeral.³⁸

Similar "chilling effect" fears expressed by members of this Court from time to time have proved unfounded. In *United States v. Causby*, 328 U.S. 256 (1946), this Court found a taking resulting from airplane overflight. Mr. Justice Black dissented in part upon the ground that the case would open the door to wholesale damage claims related to airport use. The "chilling effect" on airport construction argument formed no part of Justice Black's dissent in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), a case virtually identical to *Causby*. Whether this is an implicit admission or not, there has obviously been no "chilling effect" on airport use and construction as a result of *Causby* or similar cases.

As the courts have found liability for physical invasions in an ever-expanding universe of fact situations, stretching the concept of proximate cause to its limit, there has been no hue

³⁷ If the purpose of "inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of public improvements'" (*Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970)), then "chilling effect" is irrelevant.

³⁸ See, e.g., *Orme v. State of California ex rel Department of Water Resources*, 83 Cal. App. 3d 178, 147 Cal. Rptr. 735 (1978) (groundwater damage caused by surcharge of underground water table due to dam construction); *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 572 P.2d 43, 142 Cal. Rptr. 429 (1977) (effect of noxious odors from a sewer plant on downwind property); *McMahon's v. City of Santa Monica*, 146 Cal. App. 3d 683, 194 Cal. Rptr. 582 (1983) (water damage from bursting pipes); *Aetna Life & Casualty v. Los Angeles*, 170 Cal. App. 3d 865, 216 Cal. Rptr. 831 (1985) (fire damage to remote structure resulting from brush fire caused by short in power lines). See also this Court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

and cry that this trend has a "chilling effect" upon the construction of public improvements. The more recent opinions contain no reference to "chilling effect" at all. And yet the physical invasion cases deal with circumstances where liability is unexpected, unpredictable and sudden.

The effect of physical invasion may be identical to the effect of a regulation. The Brennan *San Diego* opinion notes (450 U.S. at 652):

Police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

The damage arising from regulation results from a deliberate, informed act, supposedly undertaken after due consideration of consequences. Here, for example, Davis wants an open space buffer on its boundaries. JA 49-50 ¶ 21. Instead of condemning fee title (or some lesser interest such as an open space easement, an easement of light and air or development rights), it has accomplished its purpose by denying access and available public services and inducing Yolo County to restrict the use of the Property, in effect, to nothing. *Id.* The impact on Owner is the same as a physical invasion. As matters now stand, Owner is holding the Property without compensation so that the citizens of Davis can enjoy it as open space. JA 60 ¶ 33.

In this case, and in every case where the taking claim arises out of a deliberative proceeding where the regulation has been applied to specific land after due consideration, the liability is

neither sudden nor unpredictable. Given the nature of regulation, the taking is not irreversible either. Brennan *San Diego* opinion, 450 U.S. at 656, 658-59.

(d) Awarding Compensation Will Not Result In Judicial Usurpation Of Legislative Power Over Fiscal Resources

The argument that awarding just compensation would result in judicial usurpation of legislative power over fiscal resources is another way of saying that the government should not be required to pay unless it intends to be so obligated. That argument cannot survive *Owen*, *Bivens*, or *Regional Rail Reorg. Act Cases*, nor can it be squared with *Loretto*, *Kaiser Aetna*, *Armstrong* or *Willow River*.

The Brennan *San Diego* opinion answers the contention directly (450 U.S. at 652-53):

"the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J. concurring) (emphasis in original)

The effect upon the regulated party is what counts.

C. Owner Has Alleged A Violation Of 42 U.S.C. § 1983

The Court of Appeal held that Owner failed to state a cause of action under 42 U.S.C. § 1983 because Owner did not allege that it was deprived of a property right without due process of law. JA 135. That conclusion misinterprets the law and the Complaint. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).³⁹

The Complaint properly alleges violation of § 1983. JA 65 ¶¶ 50-51. In *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), the Court stated:

By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must

³⁹ See authorities cited in Bley, *Use of the Civil Rights Acts to Recover Damages for Undue Interference With the Use of Land*, in Southwestern Legal Foundation, *Proceedings of the Institute on Planning, Zoning, and Eminent Domain* 7-1 (1985).

allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

"It has often been repeated that complaints under the Civil Rights Act are to be liberally construed." *Roberts v. Acres*, 495 F.2d 57, 59 (7th Cir. 1974). *Accord, Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980). The Civil Rights Act protects rights in property as well as rights in the person. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).⁴⁰

In the Complaint Owner alleges that the actions of Davis and Yolo County deprive it of all economically viable use of the Property by taking it for public use without just compensation, thus violating Owner's Fifth and Fourteenth Amendments right to just compensation. JA 65 ¶ 51. Owner has also alleged that Davis and Yolo County have so acted under color of state law. JA 49-50 ¶ 21, 51 ¶¶ 23-24, 65 ¶ 51. Thus, Owner has stated a cause of action under § 1983. State courts have concurrent jurisdiction to hear such actions. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980); *Williams v. Horvath*, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976).

Davis and Yolo County argue that Owner has not exhausted its administrative remedies. As we demonstrate below, they are wrong⁴¹—but even so, administrative remedies need not be exhausted as a precondition to a § 1983 case. *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

Owner has properly alleged a cause of action under § 1983 in a proper forum against appropriate parties.

⁴⁰ "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

⁴¹ See pages 28-31 *infra*.

D. This Case Is Ripe For Decision. No Further Action Short Of Trial Is Required By Owner To Establish How The Regulations Are Applied To The Property

This Court concluded that *Hamilton Bank* was not ripe for decision and it therefore did not reach the merits. In *Agins W*, the Court also did not reach the merits because it could not determine how the regulations in question would be applied to the property there in issue, as the property owner had never applied for a permit. We deal with these "exhaustion" and "ripeness" issues together because, although separate and distinct, they are related, and in earlier judicial proceedings in this case Davis and Yolo County have confused them.

1. The Administrative Decision In This Case Is Final

This Court explained the "ripeness" doctrine in *Pacific Gas & Electric v. State Energy Resources Commission*, 461 U.S. 190, 200-01 (1983) ("PG&E"):

The basic rationale of the ripeness doctrine "is to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

...

The question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."

This case is ripe under the PG&E test. It is not an abstract disagreement, but a case in which Davis and Yolo County have taken definitive action with respect to the Property. Specifically, the Yolo County Planning Commission disapproved Owner's proposed subdivision map.⁴² Owner then appealed to the

⁴² Due to the scope of the Subdivision Map Act (which applies to virtually all land division, utility, road and service installation by a private

(Footnote continued)

legislative body of Yolo County, its Board of Supervisors. JA 51 ¶ 23. The Board is, under California law, the final administrative arbiter of a subdivision application. Cal. Gov't Code § 66452.5 (Deering Supp. 1985). The Board rejected Owner's appeal and made clear findings to explain its reasons. JA 51 ¶ 23. That appeal exhausted Owner's administrative remedies. See *Topanga Ass'n For A Scenic Community v. County Of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

Moreover, in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), this Court reiterated that a party is not required to exhaust state administrative remedies as a precondition to suit under 42 U.S.C. § 1983. *Hamilton Bank* restates the conclusion once again. 105 S. Ct. at 3120. Under *Patsy*, Yolo County's and Davis' exhaustion arguments are irrelevant as against Owner's § 1983 claims.

2. The Regulations Have Been Applied Definitively To The Property And Any Further Application For Permission To Make An Economic Use Of The Property Would Be Futile

Yolo County and Davis would have the Court hold that a property owner must pursue an indeterminate number of

(Footnotes continued from previous page)

developer), approval of a map would be required in order to make any economic use of the Property. Any division of property for purposes of sale, lease or financing constitutes a "subdivision." Cal. Gov't Code § 66424 (Deering Supp. 1985). It is unlawful to enter into a transaction with respect to a parcel in a subdivision unless the parcel was validly created pursuant to the SMA. Cal. Gov't Code §§ 66499.30, 66499.31 (Deering 1979 and Supp. 1985). A transaction entered into with respect to an illegal parcel is voidable. Cal. Gov't Code § 66499.32 (Deering 1979). See also Cal. Gov't Code § 66499.33 (Deering Supp. 1985). The "subdivider" in such a case is liable for all damages caused to successors and encumbrancers. Cal. Gov't Code § 66499.32(b). No development permit or entitlement can be granted for use of the illegal parcel or lot. Cal. Gov't Code § 66499.34 (Deering 1979). Although the SMA contains exceptions and procedural shortcuts in circumstances not relevant here, it eliminates for all practical purposes conveyance or use of parcels described by metes and bounds in the State of California. To create a lawful division of land, the owner must secure approval of a final subdivision map by processing it under the S. A and local ordinances promulgated thereunder. The standards for approval are established by Cal. Gov't Code §§ 66473.5 and 66474 (Deering Supp. 1985).

further proceedings, seeking an indeterminate variety of approvals, before the property owner's claim is ripe.

This Court decided in *Agin II* and *Hamilton Bank* that a property owner must make an application for use of his property in order to demonstrate the specific manner in which regulations are applied as a precondition to a claim that the regulations violate his constitutional rights. Neither case held that a property owner can never state a claim so long as any other conceivable development proposal might possibly be accepted in some future proceeding, no matter how dim the prospects of such approval or large the burden of such a series of applications.

Here Yolo County not only denied Owner's subdivision application, but did so (at Davis's urging) on grounds equally applicable to any other proposal for a use other than agriculture. JA 50-51 ¶¶ 22, 24; 60 ¶¶ 33, 34. It thereby implemented Davis's policy to preclude any use of the Property other than agriculture, despite the County's own residential zoning of the Property. *Id.* at 49 ¶ 21; 58 ¶ 27. For this Property, "only agricultural use" is simply a euphemism for "no use." JA 61 ¶ 37.

Hamilton Bank also held that plaintiff land owner's action was not ripe because plaintiff had "not yet obtained a final decision regarding how it will be allowed to develop its property." 105 S. Ct. at 3119. The proposed development plan did not comply with applicable ordinances —and it was denied on that ground. Plaintiff there did not "seek variances that would have allowed it to develop the property according to its proposed plat" 105 S. Ct. at 3117.

Here, Owner's proposed subdivision map conformed in all respects with the applicable Yolo County general plan and zoning ordinance. JA 49 ¶ 20. Yolo County did not deny the application because the proposed residential plan was too dense or did not conform with residential design or improvement requirements. Yolo County denied Owner's application because the proposed use was "wrong," i.e., residential as opposed to agricultural. JA 51 ¶ 24. The County decided to follow Davis's policy and restrict the Property to agricultural

use. JA 50-51, ¶¶ 22, 24. That decision is as final as it will ever be. *Id.* at 60 ¶ 33. And here, unlike *Hamilton Bank*, there is no variance or other procedure by which Owner might derive a use.⁴³

Owner has alleged how Yolo County and Davis have applied their regulations to the property in this case. Nothing more is required to state a claim for trial.

3. Owner's Petition For Administrative Mandate Pending In The State Court Does Not Render This Case Unripe

Yolo County and Davis contend that this case is not ripe for decision because Owner's pending petition for writ of mandate gives Owner an adequate state remedy. There are two answers to this argument, each of which is dispositive of the issue:

(a) In *Hamilton Bank* this Court observed that the plaintiff property owner had an adequate state remedy because Tennessee recognized a compensation remedy. 105 S. Ct. at 3121. But as the California Court of Appeal held in this case (JA 130), California recognizes only the remedy of invalidation for regulatory takings under *Agin I*. That is the best for which Owner can hope from its mandate action. The key issue in this case is whether the Constitution requires a remedy of not *mere* invalidation, but *just* compensation for a regulatory taking. If invalidation is a constitutionally inadequate remedy, then, *a fortiori*, Owner has no adequate state remedy to pursue in the mandate case.

(b) The Court of Appeal opinion in this case holds that County acted in accordance with California law when it denied Owner's application for approval of a subdivision. JA 130-33. If affirmed here, *that opinion collaterally*

⁴³ In California, a variance cannot lawfully be granted for a change of use. Cal. Gov't Code § 65906. Cf. *Furey v. City of Sacramento*, 24 Cal. 3d 862, 871, 598 P.2d 844, 849, 157 Cal. Rptr. 684, 689 (1979).

estops any contention to the contrary in the mandate action.⁴⁴ The mandate action is, therefore, decided by this action.

E. The Recent Cases In Which This Court Has Failed To Find A Taking Are Readily Distinguishable From This Case

Penn Central, *Agins II*, *San Diego* and *Hamilton Bank* are all recent cases in which the Court considered a claim that property had been taken by excessively burdensome land use regulation. The Court found no taking in *Penn Central* and did not reach the issue in the other three cases. All are readily distinguishable here.

In *Penn Central* the property owner conceded that the regulation left it with a profitable use, and the regulatory scheme provided transferable development rights as compensation for the burden of the regulation. 438 U.S. at 129. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). Neither reasonable use nor compensation in any form are provided or available to Owner under state law in this case.

In *Agins II* the Court held that because the property owner had not sought a development approval, the Court could not determine the manner in which the regulations would be applied. 447 U.S. at 262-63. That problem does not exist here. Owner applied for an approval under existing residential zoning and was rejected with definitive statements, reinforced

⁴⁴ *Wall v. Donovan*, 113 Cal. App. 3d 122, 169 Cal. Rptr. 644 (1980). *Surphin v. Speik*, 15 Cal. 2d 195, 201-02, 99 P.2d 652, 655 (1940) holds that the prior action (i.e. this case) is *res judicata* as to all issues raised or which could have been raised as against a subsequent proceeding or different causes of action seeking different relief from the same issues. If the issue is addressed in the prior proceeding, even though it need not be, it is binding on subsequent ones. *Bank of America v. McLaughlin Land and Livestock Co.*, 40 Cal App. 2d 620, 628, 105 P.2d 607, 612 (1940). The Court of Appeal in this case decided that there was no taking. "In any event, even if an inverse condemnation action were available in a land use regulation situation, we would be constrained to hold that plaintiff has failed to state a cause of action." JA 132.

by subsequent conduct, demonstrating that all future development applications would be similarly rejected.

In *San Diego* the Court concluded that there was no final judgment to be reviewed because the California Court of Appeal had remanded the case for further trial. 450 U.S. at 632. In this case, by contrast, the judgment is plain and absolute. The trial court's judgment was "dismissed with prejudice" (JA 122). The California Court of Appeal (JA 136): "The judgment is affirmed." The Supreme Court of California (JS App. B): "petition for hearing DENIED." Those rulings are unambiguously final.

Finally, in *Hamilton Bank*, a federal case, the Court concluded that the property owner had not completed proceedings necessary to determine how the regulations would be applied in final form (105 S. Ct. at 3119) and that, in any case, the property owner had an adequate state remedy since Tennessee recognizes a right to compensation for regulatory taking. 105 S. Ct. at 3121. In this case, of course, California recognizes no such right (as the Court of Appeal held, JA 130-31), and Owner has received a definitive and emphatic denial of its application for use.

This case, in short, squarely presents the taking issue fully ripened, from a state that recognizes no meaningful remedy and with regulations that destroy all economic use of Owner's property.

CONCLUSION

Owner has pleaded a claim for just compensation. It is entitled to a trial on that claim. This Court should reverse the decision of the California Court of Appeal (as confirmed by the California Supreme Court's denial of Owner's petition for hearing) and remand this case for trial with direction that: (1) the allegations in the Complaint establish a *prima facie* case of a regulatory taking for public use under the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983, and (2) assuming those claims are proved, Owner is entitled to just compensation for the taking. The amount and nature of the compensation should be determined in accordance with proof at trial of the value of the property interest taken and the damage caused by the acts of Yolo County and Davis.

Dated: December 19, 1985

Respectfully submitted,

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APPENDIX A

PERTINENT CALIFORNIA STATUTES

Yolo County and Davis imposed the restrictions for which Owner seeks just compensation under The Planning and Zoning Law (Cal. Gov't Code §§ 65000-65993) (Deering 1979 and Supp. 1985) and the Subdivision Map Act (*id.* §§ 66410-66499.37). Since these statutes are too lengthy to reproduce in total, we print relevant excerpts below.

1. Chapter 3 Local Planning. Government Code §§ 65100-65763. [Excerpts].

Section 65100 Planning Agencies. There is in each city and county a planning agency with the powers necessary to carry out the purposes of this title. The legislative body of each city and county shall by ordinance assign the functions of the planning agency to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof, as it deems appropriate and necessary. In the absence of an assignment, the legislative body shall carry out all the functions of the planning agency.

Section 65300 Preparation of plan; Adoption; Purpose. Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning. Chartered cities shall adopt general plans which contain the mandatory elements specified in Section 65302.

Section 65300.5 Legislative intent. In construing the provisions of this article, the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency.

Section 65300.7 Legislative finding. The Legislature finds that the diversity of the state's communities and their residents

requires planning agencies and legislative bodies to implement this article in ways that accommodate local conditions and circumstances, while meeting its minimum requirements.

Section 65301 *Preparation of plan; Manner; Adoption.*

(a) The general plan shall be so prepared that all or individual elements of it may be adopted by the legislative body, and so that it may be adopted by the legislative body for all or part of the territory of the county or city and such other territory outside its boundaries which in its judgment bears relation to its planning.

[balance of section omitted]

2. Chapter 4 Zoning Regulations. Government Code §§ 65800-65919.12.

Section 65800 *Legislative purpose and intention.* It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city. Except as provided in Article 4 (commencing with Section 65910) and in Section 65913.1, the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.

Section 65804 *Procedural standards and rules.* It shall be the purpose of this section to implement minimum procedural standards for the conduct of city and county zoning hearings. Further, it is the intent of the Legislature that this section provide such standards to insure uniformity of, and public access to, zoning and planning hearings while maintaining the maximum control of cities and counties over zoning matters.

[balance of section omitted]

Section 65852 *Uniformity of regulations.* All such regulations shall be uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones.

Section 65860 *Conformity to general plan: Action to enforce compliance.*

(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if:

(i) The city or county has officially adopted such a plan, and

(ii) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan.

(b) Any resident or property owner within a city or a county, as the case may be, may bring an action in the superior court to enforce compliance with the provisions of subdivision (a). Any such action or proceedings shall be governed by Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. Any action or proceedings taken pursuant to the provisions of this subdivision shall be taken within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance as to said amendment or amendments.

(c) In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to such a plan, or to any element of such a plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.

[subsection (d) omitted]

Section 65906 *Granting variances.* Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits.

3. Subdivision Map Act: Government Code §§ 66410-66499.37.

Section 66411 *Regulation by local agencies; Ordinances.* Regulations and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance regulate and control subdivisions for which this division requires a tentative and final or parcel map.

[balance of section omitted]

Section 66413 *Operation of maps, etc., respecting subdivision areas annexed to city.*

(a) When any area in a subdivision as to which a final map has been finally approved by a board of supervisors and filed for record pursuant to this division is thereafter annexed to a city, the final map and any agreements relating to such subdivision shall continue to govern such subdivision.

[subsection (b) omitted]

Section 66424 *"Subdivision".* "Subdivision" means the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future except for leases of agricultural land for agricultural purposes. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way. "Subdivision" includes a condominium project, as defined in Section 1350 of the Civil Code, a community apartment project, as defined in Section 11004 of the Business and Professions Code, or the conversion of five or more existing dwelling units to a stock cooperative, as

defined in Section 11003.2 of the Business and Professions Code. As used in this section, "agricultural purposes" means the cultivation of food or fiber or the grazing or pasturing of livestock.

Section 66424.5 *"Tentative map"; "Vesting tentative map".*

(a) "Tentative map" refers to a map made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it and need not be based upon an accurate or detailed final survey of the property.

[subsection (b) omitted]

Section 66426 *Subdivisions, etc., for which tentative and final map required: Exceptions, and required parcel map.* A tentative and final map shall be required for all subdivisions creating five or more parcels, five or more condominiums as defined in Section 783 of the Civil Code, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except where:

(a) The land before division contains less than five acres, each parcel created by the division abuts upon a maintained public street or highway and no dedications or improvements are required by the legislative body, or

(b) Each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway, or

(c) The land consists of a parcel or parcels of land having approved access to a public street or highway which comprises part of a tract of land zoned for industrial or commercial development, and which has the approval of the governing body as to street alignments and widths, or

(d) Each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter of a quarter section.

A parcel map shall be required for those subdivisions described in subdivisions (a), (b), (c) and (d).

Section 66474 *Denial of approval of map upon certain findings.* A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.

(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

(c) That the site is not physically suitable for the type of development.

(d) That the site is not physically suitable for the proposed density of development.

(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

(f) That the design of the subdivision or the type of improvements is likely to cause serious public health problems.

(g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements

for access through or use of property within the proposed subdivision.

Section 66499.32 *Voidable instruments and transactions, and parties affected: Action for damages.*

(a) Any deed of conveyance, sale or contract to sell real property which has been divided, or which has resulted from a division, in violation of the provisions of this division, or of the provisions of local ordinances enacted pursuant to this division, is voidable at the sole option of the grantee, buyer or person contracting to purchase, his heirs, personal representative, or trustee in insolvency or bankruptcy within one year after the date of discovery of the violation of the provisions of this division or of local ordinances enacted pursuant to the provisions of this division, but the deed of conveyance, sale or contract to sell is binding upon any successor in interest of the grantee, buyer or person contracting to purchase, other than those above enumerated, and upon the grantor, vendor, or person contracting to sell, or his assignee, heir or devisee.

(b) Any grantee, or his successor in interest, of real property which has been divided, or which has resulted from a division, in violation of the provisions of this division or of local ordinances enacted pursuant thereto, may, within one year of the date of discovery of such violation, bring an action in the superior court to recover any damages he has suffered by reason of such division of property. The action may be brought against the person who divided the property in violation of the provisions of this division or of local ordinances enacted pursuant thereto and against any successors in interest who have actual or constructive knowledge of such division of property.

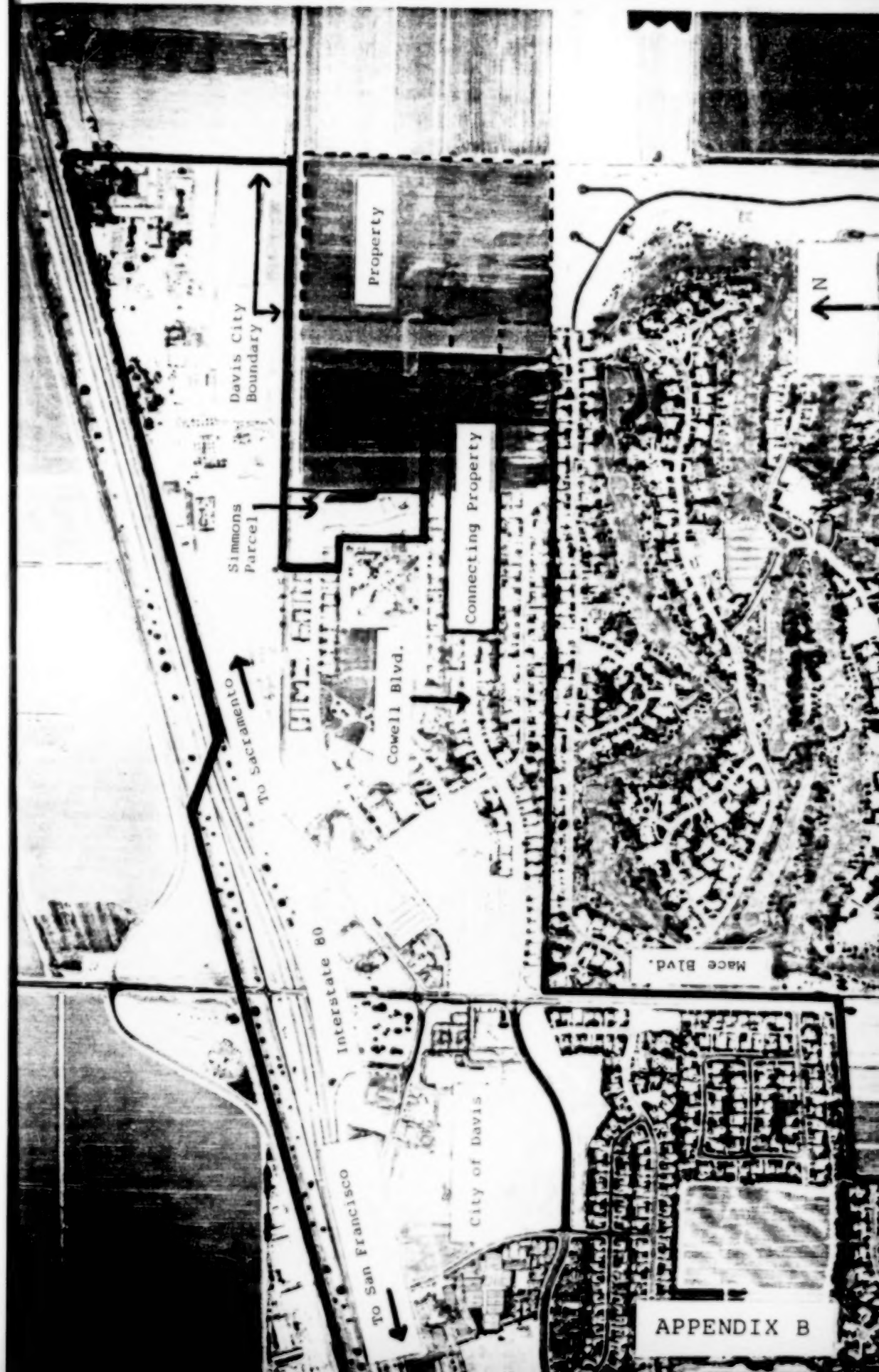
The provisions of this section shall not apply to the conveyance of any parcel of real property identified in a certificate of compliance filed pursuant to Section 66499.35 or identified in a recorded final map or parcel map, from and after the date of recording.

The provisions of this section shall not limit or affect in any way the rights of a grantee or his successor in interest under any other provision of law.

Section 66499.33 *Absence of bar to other remedy, and right to sue to restrain violation.* This division does not bar any legal, equitable or summary remedy to which any aggrieved local agency or other public agency, or any person, firm, or corporation may otherwise be entitled, and any such local agency or other public agency, or such person, firm, or corporation may file a suit in the superior court of the county in which any real property attempted to be subdivided or sold, leased, or financed in violation of this division or local ordinance enacted pursuant thereto is located, to restrain or enjoin any attempted or proposed subdivision or sale, lease, or financing in violation of this division or local ordinance enacted pursuant thereto.

Section 66499.34 *Denial of permit for, or approval of, development of property in violation of provisions; Conditional permit or approval; Certificates of compliance.* No local agency shall issue any permit or grant any approval necessary to develop any real property which has been divided, or which has resulted from a division, in violation of the provisions of this division or of the provisions of local ordinances enacted pursuant to this division if it finds that development of such real property is contrary to the public health or the public safety. The authority to deny such a permit or such approval shall apply whether the applicant therefor was the owner of record at the time of such violation or whether the applicant therefor is either the current owner of record or a vendee of the current owner of record pursuant to a contract of sale of the real property with, or without, actual or constructive knowledge of the violation at the time of the acquisition of his or her interest in such real property.

[balance of section omitted]



APPELLEE'S

BRIEF

JAN 27 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,
v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal from the Court of Appeal of California

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QUESTIONS PRESENTED

1. Do the well pled "facts" of appellant's complaint state a "final determination" upon which a ripe "taking" claim is presented where the County, at the City's urging, denied one relatively intensive residential subdivision proposal based upon specifically articulated planning and environmental objections, and where:

a. Conclusory allegations of finality, exhaustion, or futility are not deemed admitted by demurrer under California law;

b. Appellant failed to submit any alternative subdivision designs to the County addressing County's objections to the initial proposal;

c. Appellant failed to seek any variances to County's objections to the initial proposal;

d. Appellant has ignored all nonagricultural uses permitted or conditionally permitted under County zoning ordinances for the property even though development uses are permitted as a matter of state law without submission of a subdivision map;

e. Appellant has failed to utilize County procedures to seek relief from sewer assessments or taxes?

2. Do the well pled "facts" of appellant's complaint state a regulatory "taking" under the fifth and fourteenth amendments, or under 42 U.S.C. § 1983 where the County, at the City's urging, denied one relatively intensive residential subdivision proposal based upon specifically articulated planning and environmental objections, and where:

a. Conclusory allegations and allegations contrary to judicially noticed facts are not deemed admitted under California pleading law;

b. Appellant is precluded by the doctrine of collateral estoppel from asserting allegations attacking the facts and issues determined by the County in denying appellant's tentative subdivision map;

c. Development uses are available as a matter of state law on appellant's property without submitting a subdivision map;

d. Subdivision development is available on appellant's property upon submission of a map which by redesign or variance addresses the County's objections;

e. The allegations of the complaint refer only to the proposed subdivision site, and fail to address the uses and value of appellant's parcel as a whole;

f. Appellant has failed to allege destruction of an existing property right cognizable under state law?

3. If a regulatory "taking" is stated, whether a damage remedy is required by the fifth amendment or 42 U.S.C. § 1983 for the temporary deprivation of all use and value of the property during the application of the regulation to the property, or whether invalidation of the regulation is the proper remedy?

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BRIEF FOR APPELLEES

JURISDICTION

If this Court has jurisdiction, it is premised under 28 U.S.C.A. § 1257(2) (West 1966). For the reasons discussed in this brief, appellees contend that a substantial federal question has not been presented.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the fifth and fourteenth amendments to the United States Constitution, 42 U.S.C.A. § 1983 (West 1981) and provisions of the California Government Code as stated by appellant. Pertinent provisions in the California Government Code (West 1983 & Supp. 1986) also include: §§ 56001, 65302, 65400, 65402(a), 65850, 65851, 65852, 65901, 65906, 66411, 66412(a), 66412.1, 66418, 66419, 66424, 66424.5, 66426, 66452.3, 66452.4, 66452.5, 66453, 66473, 66473.5, 66474, 66474.01, 66499.37. These statutes appear in Appendix B. Also involved are County zoning ordinances. Except for Yolo County Code Zoning Regulations §§ 8-2.1006 and 8-2.1106 (Supp. C.T. 63, 65), the most pertinent provisions of the ordinances are reproduced in the Joint Appendix. (J.A. 137-56.)

STATEMENT OF THE CASE

Appellant, MacDonald, Sommer and Frates claims its property was "taken" by the County of Yolo ("County") and City of Davis ("City"). This appeal is from a judgment based upon sustained general demurrers to appellant's fourth amended complaint.

Because of the procedural posture of the case, it is absolutely critical to understand what "facts" are deemed admitted by a general demurrer in California. Appellant's statement of the case is grossly inaccurate because it is premised on the assumption that under California law all allegations of the complaint are "facts" deemed admitted by demurrer. (Appellant's Brief at 3.) This as-

sumption is false. The California Court of Appeal described appellant's claim as follows:

Pared to their essence, the allegations are that [appellant] purchased property for residential development, the property is zoned for residential development, [appellant] submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application.

J.A. 132.

The Court of Appeal was required to pare the allegations to their essence because, under California law, the facts which are deemed "admitted" by a general demurrer are limited by two basic legal principles. First, a general demurrer only admits well pled factual allegations. It does not admit contentions, deductions, or conclusions of fact or law alleged in the complaint, or facts impossible in law, or allegations contrary to facts of which a court may take judicial notice.¹ Allegations contrary to judicially noticed facts are disregarded.²

¹ *Agins v. City of Tiburon*, 447 U.S. 225, 259 n.6 (1980); *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 105 & n.2, 106 nn.3 & 4, 127 Cal.Rptr. 520 (1976); *Pan Pacific Properties v. County of Santa Cruz*, 81 Cal.App.3d 244, 251, 255, 146 Cal.Rptr. 428; (1978); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal.App.3d 82, 91-93, 143 Cal.Rptr. 441 (1978); *Serrano v. Priest*, 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971); *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 511, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), *cert. den.*, 425 U.S. 904 (1976); *Martinez v. Socoma Cos.*, 11 Cal.3d 394, 399, 113 Cal.Rptr. 585, 521 P.2d 841 (1974); *Holmes v. City of Oakland*, 260 Cal.App.2d 378, 382, 67 Cal.Rptr. 197 (1968).

² *Dale*, 55 Cal.App.3d at 105, 106 & n.4, 127 Cal.Rptr. 520; *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal.App.3d 951, 955, 199 Cal.Rptr. 789 (1984). Items judicially noticeable are governed by Cal. Evid. Code §§ 451-54, 459 (West 1966 & Supp. 1986). The materials judicially noticed by the California courts and cited by appellees are listed in Appendix C. Although California courts do not judicially notice the truth of hearsay allegations contained within judicially noticed documents, they do ju-

Where an exhibit is incorporated into the complaint, and the recitals in the exhibit conflict with the allegations of the complaint, the allegations in the complaint are disregarded.³ Second, where, as here, the "facts" were determined in a quasi-judicial administrative proceeding,⁴ a party is collaterally estopped by the doctrine of res judicata from challenging the facts and issues administratively determined unless the administrative determination is first set aside in a direct mandate challenge.⁵

These two principles of California pleading law preclude acceptance of (1) the many conclusory allegations of the complaint, and (2) those "factual" allegations which are contrary to the County Board of Supervisors' ("Board") determination and findings.

judicially notice the truth of facts asserted in orders, findings, determinations and other such documents. *Day v. Sharp*, 50 Cal.App.3d 904, 914, 123 Cal.Rptr. 918 (1975); *In re Tanya F.*, 111 Cal.App.3d 436, 440, 168 Cal.Rptr. 713 (1980).

³ *Hollister Park Inv. Co. v. Goleta County Water Dist.*, 82 Cal.App.3d 290, 292, 147 Cal.Rptr. 91 (1978); *Bell Corp. v. Bell View Oil Syndicate*, 46 Cal.App.2d 684, 691, 76 P.2d 167 (1941); *Fundin*, 152 Cal.App.3d at 955, 199 Cal.Rptr. 789.

⁴ Exhibit C. to appellant's complaint is the written determination and findings of the County Board of Supervisors on appellant's tentative subdivision map application. (J.A. 71-80.) This document was judicially noticed. (R.T. 112.) Under California law, the Board's hearings and determination to approve or deny a tentative map are quasi-judicial administrative activities, which are judicially reviewable by an action in administrative mandate. *Youngblood v. Bd. of Supervisors*, 22 Cal.3d 644, 651 n.2, 150 Cal.Rptr. 242, 586 P.2d 556 (1978); *McMillan v. American Gen. Fin. Corp.*, 60 Cal.App.3d 175, 177, 131 Cal.Rptr. 462 (1976); Cal. Gov't Code § 66452.5 (West 1983).

⁵ Administrative collateral estoppel in California is based upon the same principles enunciated by this Court in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 418-23 (1966). See *People v. Sims*, 32 Cal.3d 468, 186 Cal.Rptr. 77, 651 P.2d 321 (1982) (citing *Utah Constr.*); *City & County of San Francisco v. Ang*, 97 Cal.App.3d 673, 159 Cal.Rptr. 56 (1979). The issue of collateral estoppel is more fully discussed in Point I of our Argument.

This statement is derived solely from the face of the complaint (including exhibits), from documents which were judicially noticed by the California courts and from factual representations of appellant's counsel made to the California courts.

1. *The California Land Use Regulatory System.*

Under the California Constitution, the County and City are granted the police power. They may exercise such power within their boundaries provided that such exercise is consistent with the general laws of the state. (Cal. Const. art. XI, § 7 (West Supp. 1986). Their power to control land use is subject to a comprehensive state statutory framework.⁶

⁶ Regulation of the "design" and "improvement" of land divisions is vested in California counties and cities by the Subdivision Map Act. (Cal. Gov't Code § 66410 *et seq.* (West 1983 & Supp. 1986).) Under the Map Act, certain divisions of property into five or more parcels for "purpose of sale, lease, or financing" may only be accomplished by a subdivision map approved by the county or city within which the divided property is situated. (Cal. Gov't Code §§ 66424, 66426 (West 1983).) Subdivision approval is not required for apartment, commercial or industrial leases or financing. (Cal. Gov't Code §§ 66412(a) (West Supp. 1986), 66412.1 (West 1983).) In addition, subdivision map approval is not required for certain divisions into 20 acre minimum size parcels, nor for divisions of industrial or commercial use where the parcel or parcels have public street access. (Cal. Gov't Code § 66426 (West 1983).)

Under the Map Act, a property owner desiring to divide property first submits a "tentative" map for approval. (Cal. Gov't Code 66452 *et seq.* (West 1983 & Supp. 1986).) The map must be expeditiously processed under strict time limits of the Map Act (Cal. Gov't Code §§ 66452-52.4 (West 1983 & Supp. 1986)) and the "Permit Streamlining Act" (Cal. Gov't Code §§ 65927 (West 1983), 65943-44 (West 1983 & Supp. 1986)). Local agencies whose boundaries are within three miles of the proposed subdivision may make recommendations concerning the proposal. Such recommendations are made to the county or city having jurisdiction of the subdivision and the recommendations must be "taken into consideration." (Cal. Gov't Code § 66453 (West 1983).)

Prior to taking action on the tentative map, the agency must provide copies of any written planning staff reports to the subdivider. (Cal. Gov't Code § 66452.3 (West 1983).) The agency

2. *Appellant's Properties.*

Appellant owns three contiguous areas of land. These consist of (1) an area of approximately 44 acres which appellant denominates "the property" (J.A. 43 ¶ 6), (2) a strip of approximately 15 acres which appellant denominates "the connecting property" (*id.* ¶ 7), and (3) an area of approximately 108 acres "lying East and adjacent to the property" (J.S. 8 n.9). The 44 acre area and the 108 acre area constitute *one* tax parcel.⁷

must promptly conduct hearings on the proposal and, within 10 days following conclusion of the hearing, render its decision and findings. (Cal. Gov't Code § 66452.5 (West 1983).)

A tentative map must be disapproved if it fails to meet any of the requirements of the Map Act or local ordinances enacted pursuant to the Map Act. The Map Act also prohibits local agency approval of a tentative map unless the agency finds the proposed subdivision, together with the provisions for its design and improvement, is consistent with "the objectives, policies, general land uses, and programs" of the general plan or any applicable specific plans. (Cal. Gov't Code § 66473.5 (West Supp. 1986).) The Map Act further requires that a tentative map be denied if the local agency finds that the site is not suitable for the type of density of the development, that the design will cause environmental damage or cause serious health problems. (Cal. Gov't Code § 66474 (West 1983).)

If the tentative map is approved, the owner may file a final subdivision map. The local agency must approve the final map if it is in substantial compliance with the previously approved tentative map. (Cal. Gov't Code § 66474.01 (West Supp. 1986).)

⁷ The trial court judicially noticed the County Assessor's records (R.T. 118) which show that tax parcel 33-290-56 includes most of the 44 acre area, as well as all of the 108 acre area. (C.T. 1369.) See discussion *infra* in text at 40-41.

The acreages denoted for appellant's properties are "approximate" since appellant has used different acreage numbers in different documents to describe the same property. (*E.g.*, contrast J.A. 7 (42 acres) with J.A. 67 (44.3 acres) and C.T. 1369 (38 acres); also contrast J.S. 8 n.9 (108 acres) with R.T. 50, lines 1-4 (100 acres), C.T. 1369 (101 acres) and Appendix A ¶ 2.d.1 (111 acres).) This variation appears to be partly due to whether the acreage calculation includes or excludes the area of the public drainage easement which crosses the northerly portions of the "44" acre and the "108" acre areas. This discrepancy also appears to be due

a. Appellant purchased "the property" in 1971. Prior to this purchase, a portion of the top soil was sold to the State of California under threat of condemnation.⁸ (J.A. 74 ¶ 4.) The 44 acre area is located in an unincorporated area of the County. (J.A. 43 ¶ 6.) It is bordered by cultivated agricultural fields to the east and west. The northerly portion of the 44 acre area is crossed by a storm drainage channel which is bordered by the Davis city limit line and a large parcel occupied by the state. The low density, golf course oriented, El Macero residential development is located in unincorporated County territory south of the 44 acre area. (J.A. 7, 68.)

The use of the 44 acre area is agricultural. (J.A. 67).⁹ Since 1966, the County general plan and zoning designations for the 44 acre area have been for residential use. (J.A. 44 ¶ 8, 67.)¹⁰

to appellant's effort to redefine the existing property lines so as to state a taking of only a portion of its 167 acre holding. (C.T. 1646.)

⁸ "In or about 1962, approximately 400,000 cubic yards of top soil was removed from the TM-2462 property under threat of State condemnation for construction of I-80." (Appellant's C.A. Opening Brief at 2 n.2.)

Since owners are entitled to just compensation for state acquisition of soil, the Board found the soil was removed pursuant to a sale to the state under threat of condemnation. (J.A. 74 ¶ 4.)

⁹ The existing agricultural use of the property is denoted on the face of Exhibit A to appellant's complaint. (J.A. 67.) In addition, appellant's counsel has represented to both the trial court (R.T. 60-62, 65-67) and the Court of Appeal, the agricultural use of the property. In its December 3, 1982 Pre-Argument Statement to the Court of Appeal, at 5 ¶ 6, appellant stated: "During the years since 1975 to date, the Appellant has leased the subject property to farmers on a crop-share basis."

¹⁰ Under the laws of California, counties and cities are required to prepare, adopt and implement comprehensive, long-term general plans for the physical development of the county or city. (Cal. Gov't Code § 65300 *et seq.* (West 1983 & Supp. 1986).) The general plan is a community's constitution for future community development. *O'Loane v. O'Rourke*, 231 Cal.App.2d 774, 782, 42 Cal.Rptr. 283 (1965). The general plan must consist of a state-

b. The portion of the connecting property within the City is a strip which is 339 feet in width and approximately 1,300 feet in length. The westerly boundary of the strip abuts the easterly terminus of a City street (Cowell Boulevard). The strip extends easterly to the 44 acre area. (J.A. 67, 68.)

The connecting strip passes through and bisects an intervening cultivated parcel. The intervening parcel and the connecting strip together constitute a 56 acre area which is under cultivation. (J.A. 67, 68, 73 ¶ 3.)

c. The 108 acre area adjoins the easterly boundary of the 44 acre area. (J.S. 8 n.9, 67, 68.) The 108 acre area is in unincorporated County territory. This area is under cultivation and is designated in the County general plan and zoning regulations as agriculture. (J.A. 68; Supp. C.T. 517-19.)

3. Appellant's Subdivision Proposals.

In 1975, appellant filed two separate applications for County permission to subdivide portions of its 167 contiguous acres into smaller parcels.

ment of development policies and must include a diagram and "text setting forth objectives, principles, standards, and plan proposals" and it must contain specific elements dealing with land use, circulation, housing, natural resource conservation, open space, noise, and safety. (Cal. Gov't Code § 65302 (West Supp. 1986).) The general plan is a dynamic document subject to change to meet current conditions. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 118, 109 Cal.Rptr. 799, 514 P.2d 111 (1973); *Karlson v. City of Camarillo*, 100 Cal.App.3d 789, 801, 161 Cal.Rptr. 260 (1980).

Permitted land uses are defined by local zoning ordinances adopted pursuant to the State Planning and Zoning Law. (Cal. Gov't Code §§ 65800-912 (West 1983 & Supp. 1986).) Under the Yolo County Zoning Regulations (Supp. C.T. 1-135), each zoning classification contains a list of "permitted" and "conditionally permitted" uses within the zoning classification. Zoning classifications are applied to specific geographic areas. (Cal. Gov't Code § 65851 (West 1983).) Zoning must be consistent with the objectives, policies, general land uses, and programs of the adopted general plan. (Cal. Gov't Code § 65860 (West 1983).)

Map No. 2462 proposed to subdivide the 44 acre area into 159 lots. (J.A. 67.) Map No. 2462 was accepted for processing and its denial by the County is the subject of this lawsuit.

Map No. 2463 sought to subdivide the 108 acre area into residential lots and was accompanied by a zone change request. This map and the zone change application were returned to appellant by the County planning staff due to inconsistency of the proposed map and zone change with the County general plan designation of agriculture for the 108 acres.¹¹

a. Tentative subdivision Map No. 2462 proposed subdivision of the 44 acre area into 143 single family (R-1) lots, 12 duplex (R-2) lots, three multiple family (R-3) lots, and one apartment-professional (R-4) lot. (J.A. 67.) The *only* street access to or from the subdivision was a proposed 1,300 foot extension of Cowell Boulevard through the intervening 56 acre cultivated field. (J.A. 67, 68, 74 ¶ 5, 77 ¶ C.1.) Additional "possible" future streets were shown over portions of the intervening field not owned by appellant, but these "possible" streets were not proposed as part of appellant's subdivision map. (J.A. 67, 74 ¶ 5, 77 ¶ C.1.)

¹¹ Map No. 2463 and related documents were returned to appellant pending its application for and County's approval of appropriate general plan amendments. (J.A. 9-10.)

In its Jurisdictional Statement, appellant cited the County planning staff's refusal to process Map No. 2463 and the zone change for the 108 acre area as an indication that the County would not accept revisions of Map No. 2462. (J.S. 8-10, 17; J.A. 9-10.) This argument is highly misleading because the County general plan land use designation of "agriculture" for the 108 acre area is distinctly different from the "residential" designation applicable to the area of Map No. 2462. (See J.A. 9-10; Motion to Dismiss at 11 n.10; Supp. C.T. 517-19.) Under California law, the County could not approve a zone change or subdivision map inconsistent with its general plan designation on the 108 acre area. (Cal. Gov't Code §§ 65860 (West 1983), 66473.5 (West Supp. 1986), 66474 (West 1983).) Further, if it disagreed with the staff's action on its 108 acre applications, appellant could have appealed staff's actions to the Board. It refused to do so. (R.T. 50, lines 1-15.)

b. Hearings were held on tentative Map No. 2462 by the County Planning Commission and by the Board. Appellant was represented by legal counsel at all of the hearings and presented extensive documentary and testimonial evidence.

During the hearings the City opposed Map No. 2462 on the ground that the proposed subdivision and its design and improvement were inconsistent with the City general plan. (J.A. 75 ¶ 10.)¹² Based on its general plan objections, the City stated it would refuse to accept the public street dedication of the proposed 1,300 foot extension of Cowell Boulevard within the City,¹³ and that it would "resist" extension of Cowell Boulevard within the City as a private street. (J.A. 74 ¶ 6.)

Upon completion of the Board's February 10, 1976 hearing, tentative subdivision Map No. 2462 was denied (J.A. 71), and the denial was confirmed in a formal written order of determination with supporting findings. (J.A. 71-80.)¹⁴

¹² Cities do not have zoning authority over unincorporated territory; however, city general plans are required to plan for development of any land outside its boundaries which "bears relation to its planning." (Cal. Gov't Code § 65300 (West Supp. 1986).) The City general plan designation for the 44 acre area was "exclusive agriculture" under the City 1959 master plan. (Supp. C.T. 331.) The City's designation for the property was changed to "agricultural preserve" or "agricultural reserve" under the City 1974 general plan. (J.A. 47 ¶ 17; Trial Exhibit 4; R.T. 121.)

¹³ Under the State Planning and Zoning Law, the City could not accept offers of street dedication until the location, purpose and extent of the street were reported upon by the City's planning agency as to conformity with its adopted general plan. (Cal. Gov't Code § 65402(a) (West 1983).) Appellant does not allege any application seeking amendment of the City general plan.

¹⁴ Despite appellant's right to insist on a written determination and findings within 10 days following the Board's February 10, 1976 hearing, appellant requested reconsideration and reopening of the hearing to present written briefs and additional evidence. The Board conducted a full day of hearings on appellant's requests and objections. The Board adopted its final determination on June 14, 1977. (J.A. 69-70.)

c. The Board certified a final environmental impact report ("EIR")¹⁵ for Map No. 2462 and found that the project had significant environmental impacts.¹⁶ (J.A. 72 ¶ 1.A-C, 80 ¶ 1.) Among the adverse environmental impacts was the removal from productivity of 40 acres of prime agricultural land and current agricultural crops on the project site. The Board also found the project would stimulate development on the "57 acres" of agricultural lands between the project site and existing development in the City. (Appendix A ¶¶ 1.a.1, 1.a.2.)

The Board also made several findings relative to inconsistency of Map No. 2462 with the County general plan. Development under the County general and specific plans is required to be sound and orderly. (J.A. 73 ¶ 1.) The general plan also requires that development be controlled to prevent the piecemeal development of subdivisions within agricultural zones resulting in the impossibility of economically farming the remaining parcels. (*Id.*) The Board found the proposed subdivision would render cultivation of the 56 acres of land between the proposed site and the nearest developed property, one-quarter mile

¹⁵ The California Environmental Quality Act ("CEQA") requires that the potential significant environmental impacts of a "project" be considered by local agencies in the land use approval process. (Cal. Pub. Res. Code § 21000 *et seq.* (West 1977 & Supp. 1986); Cal. Admin. Code tit. 14, § 15000 *et seq.* (1983).) A "project" under CEQA includes general plan, zoning, subdivision and related discretionary permits for private projects. (Cal. Pub. Res. Code § 21065 (West 1977).)

Projects which may have a significant effect on the environment must be evaluated in a written EIR. The project must be denied under CEQA unless such feasible alternative design or mitigation measures are first incorporated into the project design. (Cal. Pub. Res. Code § 21002 (West Supp. 1986); *Burger v. County of Mendocino*, 45 Cal.App.3d 322, 119 Cal.Rptr. 568 (1975).)

¹⁶ The Board's order of determination and findings specifically incorporates by reference the EIR summary of environmental impacts. (J.A. 72 ¶ C.1.) Except by such specific incorporation, the summary of environmental impacts is not in the record. The incorporated summary of environmental impacts is reprinted at Appendix A, *infra*. This material is also judicially noticeable under Cal. Evid. Code §§ 452(g), (h), 459 (West 1966).

to the west, "unfeasible" because farming operations would become a nuisance to residents of the proposed subdivision. (J.A. 73 ¶ 3.) Although the character of the soil on the proposed site had been impaired by its sale to the state, the property was still found to be within an area of prime agricultural land. (J.A. 74 ¶ 4; Appendix A ¶ 1.a.1.) Contrary to appellant's assertions, the Board did not find that the soil on the site was unsuitable for agricultural use.¹⁷

The County general plan also requires that development be controlled to provide for efficient services to new developments. (J.A. 73 ¶ 1.) Adequate ingress and egress is required under Yolo County Code § 8-1.102. (*Id.* at ¶ 2.) Yolo County Code § 8-1.702(b) requires each parcel in a subdivision to be served by a public street. (J.A. 74 ¶ 7.) The only road access proposed for the subdivision was an extension of Cowell Boulevard from its terminus within the City. (*Id.* at ¶ 5.) The Board found the proposed subdivision did not provide road access by a public street because the City reported it would refuse dedication of the proposed extension of Cowell Boulevard, and would refuse to enter into an agreement with the County or any special district for maintenance of the street within the City limits. (*Id.* at ¶ 6.) The map, as submitted, therefore failed to meet the County land development ordinance requirements. (J.A. 77-78 ¶¶ C, D.)

¹⁷ The initial draft of the Board's determination contained the proposed finding that the soil on the site "was not suitable for agricultural uses." (J.A. 83 ¶ 4.) This proposed finding, however, was not adopted. Instead, the Board found that (1) the site was located within "an area of prime agricultural land" (J.A. 74 ¶ 4), and (2) the "character of the soil on the site has been impaired by its sale to the State . . ." (*Id.*) This finding is consistent with the EIR summary adopted by the Board which found the property site to be prime agricultural land. (Appendix A ¶ 1.a.1.) The Board determined that the sale of soil to the state had changed the soil's character, not that the soil was unsuitable for agriculture. Appellant's contrary allegations (J.A. 51 ¶ 24) must be disregarded because (1) they conflict with judicially noticed facts and recitals within an exhibit appended to appellant's complaint; and (2) they collaterally attack the Board's findings.

Furthermore, the Board found the design of the proposed subdivision was likely to cause serious public health problems because the sole road access proposed for the subdivision was by way of the 1,300 foot extension of Cowell Boulevard. (J.A. 77 ¶ C.) This, the Board found, was a real and substantial public health hazard because the subdivision could be rendered "unaccessible" in the event of a natural disaster. (*Id.*)¹⁸

The Board found the site unsuitable for the development because the project failed to provide essential governmental services. (J.A. 77 ¶ B.) The subdivision site was found not to be within the City or the El Macero County Service Area ("CSA"). (J.A. 75 ¶ 9.) The Board found that although the subdivision site is entitled to sewer service by the El Macero interceptor sewer line, Yolo County Agreement No. 75-97 requires that the area served must first either be annexed to the City or the CSA. (*Id.* at ¶¶ 9, 11.) Appellant had not initiated any proceedings to annex the proposed subdivision to the CSA. (*Id.* at ¶ 11.)¹⁹ Therefore, the Board concluded that the

¹⁸ Under Cal. Gov't Code § 66474(f) (West 1983), this finding alone requires County disapproval of Map No. 2462.

¹⁹ In 1961, the County formed an assessment district ("AD") to fund construction of a sanitary sewage treatment plant and related facilities. (J.A. 46 ¶ 15.) The sewage treatment plant was later "abandoned" due to increased sewer discharge requirements. (C.T. 1135, lines 14-15.) After this abandonment, sewer service was provided to the general area through the El Macero interceptor line, a joint County and City project described in County Agreement No. 75-97. (C.T. 1106-17.) This Agreement was judicially noticed. (R.T. 113.) The County's share of the cost of providing sewer service is paid by fees charged to properties within the boundaries of the El Macero County Service Area ("CSA"). (C.T. 1111 ¶ (c)(2).) The 44 acre area is entitled to sewer service via the interceptor line upon annexation to either the City or the CSA. (J.A. 78 ¶ F.3; C.T. 1110 ¶ (3).) Although the 44 acres were within the original AD (J.A. 42 ¶ 3), appellant has never applied for annexation to the CSA. (J.A. 75 ¶ 11; C.T. 1117.)

There are clear distinctions between the AD and the CSA. The AD is not a political entity, but merely a geographical area assessed,

proposal did not provide for this essential service. (J.A. 77 ¶ B, 78 ¶ E.2.)

The proposed subdivision also failed to provide other essential governmental services,²⁰ including no provision for a public water system (J.A. 76 ¶ 14), no provision for the maintenance, lighting, and cleaning of streets within

under the taxation power, to pay the costs of bonds issued for specific public improvements. The assessments are levied upon the premise that the public improvements will be beneficial to the properties within the district. (41 Ops. Cal. Atty. Gen. 60, 64 (1963); *City of Baldwin Park v. Stoskus*, 8 Cal.3d 563, 568, 105 Cal. Rptr. 325, 503 P.2d 1333 (1972).) The assessments are levied in installments until the improvement bonds, together with interest, have been repaid. The owners of property assessed have no right or title in the improvements superior to the general public. *Ritzman v. City of Los Angeles*, 38 Cal.App.2d 470, 476, 101 P.2d 541 (1940).

There are, however, statutory procedures for administrative relief from assessments when property within an AD does not receive expected benefits of the public improvements. (Cal. Sts. & Hy. Code §§ 5500-11, 5550-65 (West 1969 & Supp. 1986); *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979), *cert. den. & appeal dismissed*, *Webber v. City of Sacramento*, 444 U.S. 976 (1979).) Appellant has refused to avail itself of such remedy. (Appellant's C.A. Opening Brief at 7 n.6.)

In contrast to the AD, the CSA is an area of unincorporated territory in which "extended governmental services" are provided under direction of the Board and the current operation, maintenance and capital improvement costs of providing such services are paid for in the form of fees or taxes. (Cal. Gov't Code § 25210.1 *et seq.* (West 1968 & Supp. 1986); C.T. 1111 ¶ (c)(2).) Inclusion within a CSA is pursuant to an annexation proceeding approved by the Local Agency Formation Commission ("LAFCO"). (Cal. Gov't Code §§ 25210.3a (West 1968), 25210.13 (West Supp. 1986).) See discussion of LAFCO in Appendix B n.1 and in Brief of the United States at 5 n.4.

In summary, the AD provided the financing vehicle to construct initial sewer improvements, but it was not a sewer service agency. Ongoing operation, maintenance and improvements of the sewer system were financed by the CSA in cooperation with the City under contract. (C.T. 1106-17.)

²⁰ These services could have been provided through a CSA or other special district formed for that purpose. (Cal. Gov't Code § 25210.1 *et seq.* (West 1968 & Supp. 1986).)

the subdivision (*id.* at ¶ 15), and no provision for parks or other recreational facilities. (*Id.* at ¶ 16.) The Board did find that residents of the proposed subdivision would utilize the parks and recreational facilities located within the City, but would not pay taxes to finance this use. (*Id.* at ¶ 18.) Additionally, the Board found that the level of protection capable of being afforded to the proposed subdivision by the County Sheriffs' Department was not intense enough to meet the needs of the proposed subdivision. (*Id.* at ¶ 13.) Therefore, the Board concluded that the design and improvement of Map No. 2462 was inconsistent with the County general and specific plans. (J.A. 73 ¶ A, 79 ¶ 1.)

4. Appellant's Lawsuits.

In response to the Board's denial of Map No. 2462, appellant filed a petition for administrative mandate (Cal. Civ. Proc. Code § 1094.5 (West Supp. 1986)) which is still pending (J.A. 21-33, 110, 131), and this action for money damages.

Appellant's initial complaint for damages was filed on October 13, 1977. On October 27, 1981,²¹ appellant filed a fourth amended complaint alleging causes of action for declaratory relief, damages in inverse condemnation, damages for deprivation of access and for recovery of taxes and assessments. In addition, the fourth amended complaint for the first time incorporated a cause of action in damages for violation of civil rights, 42 U.S.C.A. § 1983 (West 1981), and also, for the first time, alluded to the fifth and fourteenth amendments of the United States Constitution. (J.A. 42-66.)

The gravamen of appellant's complaint is that the County's denial of and City's opposition to one proposal

²¹ On July 13, 1978, counsel for the parties agreed to a "one year" "suspension of activities," terminable by any party on 60 days notice. (J.A. 18-20.) The suspension of activities was terminated more than two and one-half years later (March 1981) by appellant's filing of (1) an amended petition in the mandate action (J.A. 21-23), and (2) the third amended complaint in the damages action (C.T. 604-38).

for subdividing 44 of its 167 contiguous acres has deprived it of all viable economic use of the 44 acres.²² The complaint does not seek to invalidate any state, County or City actions or enactments.²³ The complaint does not allege any denial of due process or unfairness in the hearings or procedures of the County.

The complaint fails to factually allege denial of any other subdivision proposals or other efforts to resolve the Board's stated objections to Map No. 2462. Nor does the complaint factually allege application for any variance, conditional use, or other discretionary permits for the property. The complaint does not address the viability of use of the entire 167 contiguous acres as a whole. The complaint does not state whether a less dense or differently designed subdivision of the 44 acres is uneconomic. The complaint does not address the permitted and conditionally permitted uses of the 44 acres under its current residential zoning. The complaint seeks only one remedy, payment of \$1,250,000 for the "taking" of appellant's property. (J.A. 61 ¶ 37, 65-66)

The County and City filed demurrers to appellant's fourth amended complaint. (J.A. 92-103.) After briefing and oral argument, the trial court sustained the demurrers without leave to amend.²⁴ (J.A. 109-20.) The trial court ruled that each cause of action failed to state facts sufficient to constitute a cause of action; that each cause of action failed to allege facts showing subject matter jurisdiction in that appellant failed to exhaust

²² In its motion to consolidate the mandamus and damages actions, appellant states: "The most obvious and important factual assertion underlying the inverse condemnation suit is the denial of MacDonald, Sommer & Frates subdivision map . . ."

C.T. 76 lines 12-15.

²³ Appellant, in abandoning its declaratory relief count, conceded that it was not challenging the facial validity of any ordinance. (Appellant's C.A. Opening Brief at 11 n.7.)

²⁴ During oral argument, MacDonald's counsel stated that further amendments were not desired. (R.T. 133-34.)

available administrative and judicial remedies; and that the Board's denial of Map No. 2462 is *res judicata* and not subject to collateral attack in a *de novo* inverse condemnation action.²⁵ (J.A. 111.) Based upon the trial court's rulings, judgment was entered for the County and City on August 19, 1982. (J.A. 121-22.)

Appellant appealed portions of the judgment of dismissal to the California Court of Appeal. On appeal, appellant abandoned its declaratory relief and sewer assessment causes of action. (J.A. 129.)²⁶ In abandoning its sewer assessment causes of action, appellant acknowledged that it had not applied for available reassessment relief from the Board. (Appellant's C.A. Opening Brief at 7, n.6; J.A. 129.)

The Court of Appeal held that the complaint failed to allege facts sufficient to constitute a cause of action in inverse condemnation because (1) valuable development uses were still available to appellant; and (2) the proper remedy is invalidation of the regulation, not a suit for damages. (J.A. 130-33.) The facts alleged by appellant were held to not state a cause of action under 42 U.S.C. § 1983 because (1) other development uses are still available to appellant; and (2) adequate remedies exist under state law. (J.A. 135.) The Court of Appeal also held under state law that the refusal to provide a public dedicated road to appellant's property did not state an action in inverse condemnation because appellant had no state

²⁵ The trial court specifically took judicial notice of the pending mandate action and the fact that such action involved the same factual contentions as this action. (J.A. 110.) Appellant has virtually conceded this point. (C.T. 76 lines 12-15.)

²⁶ Contrary to appellant's claim here of "conspiratorial planning and zoning activities" (J.S. i ¶ (g)), appellant conceded in the Court of Appeal that "nowhere in their Fourth Amended Complaint do Appellants allege 'conspiracy'" and that "civil conspiracy law is inapposite to the case at bar." (Appellant's C.A. Closing Brief at 7.) In light of this concession, the Court of Appeal does not discuss "conspiracy," though the subject was addressed by the trial court. (J.A. 114-15.)

recognized property right which had been interfered with; existing access had not been denied. (J.A. 133-34.) Except as implicated in its holdings, the Court of Appeal did not reach the trial court rulings on exhaustion of remedies or *res judicata* (collateral estoppel). (J.A. 125-26.)

The California Supreme Court denied appellant's petition for hearing on April 3, 1985. Appellant docketed this appeal on June 28, 1985. The City and County filed a motion to dismiss the appeal on the grounds that the judgment rests on adequate state grounds and for lack of a substantial federal question. Probable jurisdiction was noted on October 21, 1985.

SUMMARY OF ARGUMENT

I. Appellant is collaterally estopped from challenging the Board's determination and findings. Allegations of the complaint which contradict or recharacterize the Board's findings and determination are not "admitted" by general demurrer. Such findings and determination may only be attacked by a direct mandate action which appellant initiated, but has since ignored. (R.T. 53 line 5 - 54 line 16.)

California's doctrine of collateral estoppel is consistent with this Court's holding in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 418-23 (1966).

II. Appellant has not pled a final determination upon which a ripe "taking" claim can be based. Instead, appellant alleges that it has exhausted its administrative remedies or that otherwise available remedies are "futile." A general demurrer does not admit such allegations. Under California law the factual pleading of exhaustion of administrative remedies legally available from the County is a jurisdictional prerequisite. Absence of such allegations renders the suit "premature." Though couched in terms of "prematurity" and "exhaustion," the California principle is identical to this Court's enunciation of the "ripeness" doctrine in *Williamson County Regional*

Planning Commission v. Hamilton Bank, 105 S.Ct. 3108 (1985). The procedural posture of this case offers no basis for engaging in a hypothetical taking analysis.

Appellant's "taking" claim is not ripe for four reasons. First, appellant failed to submit any redesign of Map No. 2462 to meet the Board's objections. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Second, appellant failed to seek variances from any of the Board's objections. *Williamson County*, 105 S.Ct. 3108. Third, appellant's claim that denial of Map No. 2462 relegated the property to "only" agricultural use fails as a matter of law in light of the judicially noticed non-agricultural uses permitted in the existing R-1, R-2, R-3 and R-4 zones applicable to the property. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (1980). Fourth, appellant has failed to seek tax or sewer assessment relief available from the County. *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979), cert. denied and appeal dismissed, *Webber v. City of Sacramento*, 444 U.S. 976 (1979).

III. The well pled factual allegations of the complaint do not state a taking for three reasons. First, as a matter of law non-agricultural uses are permitted on the project site under its zoning classifications. (J.A. 141-47.) *Agins v. City of Tiburon*, 447 U.S. at 259 n.6. Many of these uses are available without necessity of subdivision. (Cal. Gov't Code §§ 66412(a) (West Supp. 1986), 66412.1, 66426 (West 1983).) Second, the complaint alleges a taking only as to a discrete 44 acre portion of a 148.39 acre tax parcel which itself is only a portion of appellant's total 167 acre land holding. This type of self-segregation of a discrete property segment will not sustain a taking claim. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 130-31. Third, the complaint does not allege any cognizable property right which has been taken. Protectible property rights are created by state law. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2872 (1984). A developer in California does not acquire a property right to develop until it has made substantial

expenditures in reliance on a building permit. *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976). Appellant's payment of sewer assessments used to construct a later abandoned sewer plant, at most, entitled appellant to reassessment, however, appellant abandoned this remedy. *Furey v. City of Sacramento*, 24 Cal. 3d at 872-78, 157 Cal.Rptr. 684, 598 P.2d 844 (1979). Additionally, the City's refusal to extend Cowell Boulevard as a public street violates no property right. (J.A. 133-34.) Appellant's unilateral expectation and abstract need for a "relatively intensive" (J.A. 133) subdivision approval is not a property right.

IV. The remedy for a temporary unconstitutional land use regulation is invalidation of the regulation under the due process clause, not a suit for damages under the fifth amendment. Because the fifth amendment does not constitutionally require a damage remedy, neither does 42 U.S.C. § 1983. An interim damage remedy cannot be constitutionally required because temporary interference with use of land during the decision-making process is not a "take." Temporary interference is at most a mere diminution in property value and is considered an "incident of ownership." *Danforth v. United States*, 308 U.S. 271, 285 (1939); *Agins*, 447 U.S. at 263 n.9.

ARGUMENT

I. APPELLANT MAY NOT IN THIS DE NOVO PROCEEDING COLLATERALLY ATTACK THE FINAL FACTUAL OR ISSUE DETERMINATIONS OF THE BOARD MADE AFTER A FULL AND FAIR ADMINISTRATIVE PROCEEDING.

This Court has held that when an administrative agency, acting in a judicial capacity, resolves disputed issues properly before it which the parties have had an adequate opportunity to litigate, the determined issues may not be collaterally attacked. Such issues are deemed established unless directly challenged and set aside, as by a proceeding in administrative mandate. *United States v.*

Utah Construction & Mining Co., 384 U.S. 394, 418-23 (1966).

The California collateral estoppel rule is in accord with the holding of *Utah Construction*. Appellant is bound to the factual and issue determinations of the Board on Map No. 2462 unless it directly overturns those determinations in a mandate proceeding. *People v. Sims*, 32 Cal.3d 468, 186 Cal.Rptr. 77, 651 P.2d 321 (1982); *City & County of San Francisco v. Ang*, 97 Cal.App.3d 673, 159 Cal.Rptr. 56 (1979).²⁷

Appellant has a companion administrative mandate action challenging the Board's denial of Map No. 2462 (J.A. 21-33); however, it has scrupulously avoided prosecuting that action. Appellant's purpose in this inverse condemnation action is clear—to indirectly nullify the Board's findings, and to redefine “the character of the governmental action” (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)) upon which appellant's “takings” claim must be based. Appellant's method is to (a) set out allegations which contradict or recharacterize the Board's determination,²⁸ and

²⁷ The scope of the collateral estoppel defense is a matter of state law. *Jones v. Gann*, 703 F.2d 513, 514 (11th Cir. 1983). The trial court determined that the California rule of collateral estoppel barred appellant from litigating de novo “the same contended facts” which were determined by the Board and challenged in appellant's dormant mandate action. (J.A. 110-11.)

²⁸ Appellant collaterally attacks many of the Board's determinations by either outright contradiction or recharacterization. Examples are: (a) contradiction of the Board's determination that Map No. 2462 is inconsistent with the County “orderly growth” and “efficient services” policies (J.A. 49 ¶ 20); (b) recharacterization of the Board's findings on the character of the soil on the site (J.A. 51 ¶ 24); (c) contradiction of the Board's finding that sewer capacity is available upon annexation to the CSA (J.A. 51 ¶ 25); (d) recharacterization of the Board's finding regarding extension of Cowell Boulevard (J.A. 49 ¶ 21(c)); (e) recharacterization of the Board's finding regarding ability of the sheriff to provide service “intense enough to meet the needs of the subdivision” (J.A. 45 ¶ 12); (f) overall recharacterization of the Board's denial as being

(b) to obtain a de novo forum which will allow introduction of evidence not presented to the Board.

In *Utah Construction*, this Court recognized the problem inherent in allowing collateral attack on the determinations of an administrative agency. The Court said: “The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics.” (384 U.S. at 419.)

The Court also explained the policy reasons for giving preclusive effect to the administrative agency's determinations. To do otherwise would result in “a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end” (quoting *United States v. Bianchi & Co.*, 373 U.S. 709, 717 (1963)) and it encourages the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation.” (*Id.* at 420.)²⁹ These policy reasons are critically important in the present case. Appellant received a full opportunity to present documentary and testimonial evidence to the Board and to object to the format of the Board's findings. Appellant does not challenge the fairness of the Board's hearings or procedures. Despite the court calendar priority of its mandate action, appellant has avoided direct challenge to the adequacy of the evidence before the Board to sustain its findings and determination. (Cal. Civ. Proc. Code § 1094.5 (West Supp. 1986); Cal. Gov't Code § 66499.37 (West 1983).) Instead, it has attempted to retry “the same

based on City, rather than County, land use policies (e.g., J.A. 50 ¶ 22, 51 ¶ 24); and (g) overall recharacterization of the effect of the Board's denial of Map No. 2462 as relegating the property to “only” agricultural uses. (J.A. 51 ¶¶ 24-25.)

²⁹ The wisdom of the collateral estoppel rule enunciated by the Court in *Utah Constr.* is concurred in by the author of the preeminent treatise on administrative law. See 4 Davis, *Administrative Law*, §§ 21:1, 21:2, 21:9 (2d ed. 1983).

contended facts" (J.A. 110) by recharacterizing the already determined facts in conclusory fashion. This it cannot do. The Board's determination of facts and issues is *res judicata* as to those facts and issues and appellant's contrary allegations are not "admitted" by a demurrer.³⁰

II. THE COUNTY AND CITY ACTIONS ALLEGED IN THE COMPLAINT ARE NOT A FINAL LAND USE DETERMINATION UPON WHICH A RIPE CONSTITUTIONAL TAKING CLAIM CAN BE SUSTAINED.

Denial of only one proposed plan for subdividing property, upon specifically articulated planning and environmental objections, is not a final determination as to how appellant's property may be used. Thus, appellant's "taking" claim is not ripe.

After the Board denied Map No. 2462, appellant failed to revise its map to meet the Board's objections. Appellant failed to request hardship variances from any of the Board's objections to Map No. 2462. Appellant did not pursue any alternate conditional or permitted use under the existing zoning of the property. Appellant did not request County tax or assessment relief. Instead, appellant filed this action seeking to have the County and City purchase its property.

A. This Court has repeatedly held that claims of regulatory "takings" are not ripe until the regulatory agency has reached a final decision as to how the property may be used. *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S.Ct. 3108 (1985). The Court's reluctance to undertake a "taking" inquiry absent a final regulatory decision is "compelled by the very nature of the inquiry required by the Just Compensation Clause." (105 S.Ct. at 3119.) Such inquiry requires judicial evaluation of the effect of the regulation. Key factors in such evaluation are:

³⁰ See also Restatement (Second) of Judgments at § 83 (1982). For application of the collateral estoppel rule in a 42 U.S.C. § 1983 case, see *Allen v. McCurry*, 449 U.S. 90 (1980).

the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations (Citations.) Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County, 105 S.Ct. at 3119.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court found no taking where two development plans were rejected by the City's Landmark Preservation Commission. The Court held that denial of applications for an office building in excess of 50 stories above the Grand Central Terminal may suggest future denial of comparably sized structures, but does not suggest denial of "any" construction above the Terminal. (438 U.S. at 136-37.) In *Williamson County*, the Court pointed out that the *Penn Central* property owner had "not yet obtained a final decision regarding how it will be allowed to develop its property." (105 S.Ct. at 3119.) Similarly, rejection of appellant's Map No. 2462 does not suggest denial of "any" economically viable use on appellant's property.

B. Appellant seeks to avoid the ripeness issue by two conclusory allegations. These are (1) that denial of Map No. 2462 relegated the property to "only" agricultural uses (J.A. 51 ¶ 24), and (2) that all administrative relief was exhausted or futile (J.A. 58). Neither allegation will bear scrutiny. Both were rejected by the California courts under settled principles of state pleading practice.

First, the allegations that denial of Map No. 2462 relegated the property to "only" agricultural uses and that such land use deprives appellant of "the entire economic use of the property" was rejected as a matter of law.³¹ The Court of Appeal said:

³¹ In *Pan Pacific Properties, Inc. v. County of Santa Cruz*, similar conclusory allegations were held not admitted by demurrer. The court said:

The denial of that particular plan cannot be equated with a refusal to permit any development and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. . . . Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.

J.A. 133.

This holding of the Court of Appeal does not raise a federal question. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (1980).

Second, appellant's conclusory allegations of exhaustion of administrative remedies and futility have application to this ripeness discussion because California courts apply the ripeness doctrine under the "exhaustion" or "prematurity" label.³² A general demurrer does not admit con-

As to the allegation of no reasonable or beneficial use, it can be readily seen that the subject ordinance on its face permits beneficial use, namely a 'one-family dwelling'. Their allegation that the rezoning 'in effect requires [appellants] to provide for open space for the benefit of the public as an agricultural preserve at [appellants'] sole cost and expense' is a mere conclusion totally unsupported by any factual allegations.

81 Cal.App.3d 244, 255, 146 Cal.Rptr. 428 (1978).

Further, appellant's allegation that denial of the subdivision map relegated the property to "only" an agricultural use is a non sequiter. Subdivision maps do not directly control land use. Use is established by zoning and general plan designation, as the Court of Appeal correctly points out. (J.A. 133.) As we discuss, many of the uses permitted to appellant by County zoning regulations are fully available without necessity of subdivision.

³² See *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 269, 271, 148 P.2d 645 (1944) (Action dismissed as "prematurely brought" where property owner failed to seek an "exception" prior to filing constitutional challenge to zoning ordinance.); *Dunham v. City of Westminster*, 202 Cal.App.2d 245, 249, 20 Cal.Rptr. 772 (1962) (Application for a variance held to be a jurisdictional "prerequisite" to constitutional challenge of permit's street dedication require-

clutory "exhaustion" or "futility" allegations. The rule was stated in *Pan Pacific Properties, Inc.*, 81 Cal.App.3d at 251, 146 Cal.Rptr. 428, as follows:

[W]hile a demurrer admits all material facts which are properly pleaded, it does not admit conclusions of fact or law alleged therein. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) Appellants' conclusionary statement that they exhausted their administrative remedies therefore cannot avail them.

Under California law, therefore, the finality of the administrative decision must be factually pleaded. (*Id.*) The obligation to obtain a final administrative determination by seeking available administrative relief is a jurisdictional prerequisite to commencement of litigation. (See *supra* note 32.) Where the well pled facts show a clear case of futility, California courts do not require the land-

ment.); *Smith v. City of Duarte*, 228 Cal.App.2d 267, 269-70, 39 Cal.Rptr. 524 (1964) (Failure to seek variance rendered owner's constitutional challenge to zoning ordinance setback requirements premature.); *Ignia v. City of Baldwin Park*, 9 Cal.App.3d 909, 914-15, 88 Cal.Rptr. 581 (1970) (Complaint for unconstitutional application of zoning ordinance held premature where property owner had failed to seek either a conditional use permit or a variance. Demurrer properly sustained.); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal.App.3d 82, 93-95, 143 Cal.Rptr. 441 (1978) (Constitutional challenge to city's sign ordinance premature due to plaintiff's failure to factually allege exhaustion of the ordinance's administrative variance procedures. Demurrer properly sustained.); *Pan Pacific Properties, Inc. v. County of Santa Cruz*, 81 Cal.App.3d 244, 251, 146 Cal.Rptr. 428 (1978) (Failure to factually allege pursuit of either a conditional use permit or variance held to be a jurisdictional bar to an inverse condemnation claim. Conclusory allegation that all administrative remedies were exhausted is disregarded on demurrer.).

In *Metcalf*, 24 Cal.2d at 272, 148 P.2d 645, the Court succinctly stated the California rule, as follows: "[T]he 'remedy' to be exhausted before judicial relief might be obtained includes or consists of the 'opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like a board of supervisors, with reference to the very matter of which [the parties] complain'"

owner to pursue demonstrably unproductive avenues of relief. *Furey v. City of Sacramento*, 24 Cal.3d 862, 871, 157 Cal. Rptr. 684, 598 P.2d 844 (1979), cert. denied and appeal dismissed, *Webber v. City of Sacramento*, 444 U.S. 976 (1979); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal.App.3d 82, 91-93, 143 Cal.Rptr. 441 (1978). However, a conclusory pleading that the agency "would not, and could not, grant . . . a variance, or rule in [the property owner's] favor" will be disregarded on demurrer. (*Id.* at 93.)

By ruling that appellant failed to exhaust its administrative remedies, the trial court rejected appellant's conclusory futility allegation. (J.A. 111 ¶ 2.) The Court of Appeal also specifically ruled that submission of alternative development proposals were not precluded by denial of Map No. 2462. (J.A. 133, 135.) Both courts therefore properly concluded that the facts pleaded did not show "futility."

C. Simply stated, appellant had four viable options for meaningful relief from the County.³³ These were (1) redesign (*e.g.*, *Penn Central*, 438 U.S. 104), (2) hardship variance (*e.g.*, *Williamson County*, 105 S.Ct. 3108), (3) development of one or more of the permitted or conditional uses under the property's existing zoning designations (*e.g.*, *Agins*, 447 U.S. 255), and (4) application to the County for tax and/or assessment relief. Appellant has pursued none of them.

1. The most obvious County objection to Map No. 2462 was (1) the single access route which (2) was a City street extension not contemplated by the City general plan and (3) which would pass through 56 acres of cultivated land. (J.A. 74-75 ¶¶ 5, 6, 7, 8; 77 ¶¶ C.1., D.2.) The fourth amended complaint does not allege unavailability of alternate access routes through unincorporated

³³ In fact, appellant's objection seems to be that it had so many avenues of relief that it should not be required to pursue any of them. (Brief for Appellant at 29-30.)

County territory. The County's access objections to Map No. 2462 may have been avoided by access from the south through the adjoining El Macero development or by access along the boundaries of agricultural properties to the northeast, southeast, and east. State law specifically provides procedures for obtaining rights of way and financing street extensions to serve private development.³⁴

Another objection to Map No. 2462 was the lack of any park or recreation facilities to serve the project. Redesign of the project might have included the clustering of housing units and provision of common recreation areas. The adjoining El Macero development provides an example which appellant may have chosen to emulate. Maintenance of common recreation areas might be through a homeowners' association or through a CSA or other district formed for that purpose.

The County's finding of inadequate sheriff's resources to provide a level of police protection "intense enough to meet the needs of the proposed subdivision" may have been met by redesign. (J.A. 76 ¶ 13.) The Sheriff's Department may have been able to provide adequate service levels to a lower density development, such as the adjoining El Macero development. In addition, the existing zoning of the property allows for numerous non-residential uses which may require lower levels of police services. (*E.g.*, Yolo County Code Zoning Regulations §§ 8-2.804, 8-2.904, 8-2.1004, 8-2.1102, 8-2.1104; J.A. 141-47.) Alternatively, appellant could have applied for annexation to or formation of a CSA or other district to finance the costs of such services. This option was specifically delineated by the Board. (J.A. 77 ¶ B.1.)

³⁴ Appellant owns the 108 acre area east of the 42 acre area. Even if access were to be over lands not owned by appellant, state law provides methods whereby the County can, in cooperation with a developer, acquire and improve street extensions with costs charged to the benefitted properties. (Cal. Sts. & Hy. Code §§ 941, 943 (West Supp. 1986), 976, 1550.1, 1553, 1554 (West 1969) 5000 et seq. (West 1969 & Supp. 1986).) See *County of Fresno v. Malmstrom*, 94 Cal.App.3d 974, 978, 156 Cal.Rptr. 777 (1979).

Other Board objections to Map No. 2462 could have been eliminated by annexation to existing or available public service districts. For example, the County found that there was sewer capacity available to serve the property, but that appellant had failed to apply to LAFCO for annexation to either the City or the El Macero CSA as required by the County-City sewer service agreement. (J.A. 75 ¶¶ 9, 11, 78 ¶ F.3.) The County also found that appellant had failed to make provision for the maintenance, lighting, and cleaning of streets within the proposed subdivision. (J.A. 76 ¶ 15.) Appellant has ignored its option of revising its proposal.

2. Appellant has refused to seek variances. This refusal, alone, defeats the ripeness of appellant's taking claim. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 297 (1981); *Williamson County*, 105 S.Ct. at 3118 n.11 (failure to pursue all eight of Commission's plat objections to final decision by utilizing variance procedure rendered "taking" claim premature).³⁵

The Yolo County Zoning Regulations provide for variances based upon "practical difficulties" or "hardship." (Yolo County Code Zoning Regulations § 8-2.2901; J.A. 151.) Applications for variance are heard by the County Board of Zoning Adjustment with right of appeal to the Board. (J.A. 152-53.)

Variance proceedings are quasi-judicial in nature, requiring notice, introduction of evidence and adoption of written findings. The agency's findings must be based

³⁵ The *Williamson* Court, 105 S.Ct. at 3120-21, stated:

The Commission's refusal to approve the preliminary plat . . . prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

upon substantial evidence and must support its determination. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 514-18, 113 Cal. Rptr. 836, 522 P.2d 12 (1974).

Variances may not be granted for uses which are inconsistent with the general plan or zoning designations. (Yolo County Code Zoning Regulations § 8-2.2902(b); J.A. 151; Cal. Gov't Code § 65906 (West 1983).) However, since appellant's 44 acre area is designated for residential use in both the County general plan and zoning ordinance, this limitation does not bar variances to allow appellant's desired residential development.

The Board's decision on Map No. 2462 was largely based upon the "sound and orderly development" policy of § 8-2.104 of the zoning ordinance. (J.A. 73 ¶ A.2, 79 ¶ 2, 137.) Further, the zoning ordinance recited the County's requirement that "building sites" have public street frontage or "adequate" access thereto. (Yolo County Code Zoning Regulations § 8-2.260; J.A. 138.)³⁶ Appellant was entitled to seek hardship relief from these provisions through the County variance procedure. Under California pleading law, appellant cannot obviate its duty to seek variances by merely pleading that the agency "would not" or "could not, grant them a variance." *Mountain View Chamber of Commerce*, 77 Cal.App.3d at 93, 143 Cal. Rptr. 441. (Cf., J.A. 58.)

Importantly, the variance procedure is designed to provide relief for "hardship"³⁷ and hardship is the very

³⁶ Although County Code Zoning Regulations § 8-2.260 requires that a building site have frontage on an approved and accepted public street, a variance could have authorized a private access street. (Yolo County Code Zoning Regulations § 8-2.2901; J.A. 151.) The City indicated it would "resist" a private road extension of Cowell Boulevard, not that it would or could refuse such an extension. (J.A. 74 ¶ 6.) Appellant never sought a variance to the County's requirement of an approved and accepted public street for the subdivision.

³⁷ "The essential requirement of the variance is a showing that strict enforcement of the zoning limitations would cause unneces-

basis of appellant's taking claim here. In a variance proceeding, appellant would have had the opportunity to present evidence of the economic hardship which it claims would be incurred by compliance with the County's objections to Map No. 2462.

The variance procedure provides two essential elements upon which a proper "taking" analysis should proceed. First, it provides a process whereby "the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County*, 105 S.Ct. at 3120. Second, it assures that the evidentiary basis for the owner's hardship claim will be presented at the administrative level. Thus, the property owner is encouraged to lay its cards on the table and fully disclose the factual basis of its economic hardship claim. Appellant's failure to pursue a final determination under the County variance procedures presents this "taking" claim in a hypothetical posture.²⁸

sary hardship. The burden of showing hardship is on the applicant." *Tustin Heights Ass'n v. Bd. of Supervisors*, 170 Cal.App.2d 619, 627, 339 P.2d 914 (1959). See also, *Zakessian v. City of Sausalito*, 28 Cal.App.3d 794, 799-800, 105 Cal.Rptr. 105 (1972).

²⁸ While we agree with much of the ripeness discussion of the United States, we strenuously disagree with the government's suggestion that the procedural posture of this case may allow the Court to "deem" ripeness. (Brief of the United States at 10, 14-15.) The government's "deemed ripeness" approach is based upon the absolutely incorrect premise that an allegation of "futility" of administrative relief is admitted by a demurrer.

A doctrine of "deemed ripeness" is totally out of step with this Court's holdings that constitutional issues be resolved upon the basis of concrete facts. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). Acceptance of a "deemed ripeness" doctrine by the Court would not only encourage cases to be tried on hypothetical facts, but it would also promote needless expense of precious judicial resources.

The government's suggestion of "deemed ripeness" is particularly bizarre since it notes that the trial court found appellant's claim not to be ripe (Brief of the United States at 16) and that the Court of Appeal specifically found denial of Map No. 2462 did not bar alternate development proposals (*id.* at 9).

In assessing ripeness this Court has also evaluated the hardship upon the parties of withholding Court consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Here, appellant suffers no hardship by pursuing variance relief. Appellant would present the same evidence in a variance proceeding that it would present de novo in the trial of this matter. If variances are granted, appellant has achieved relief without the cost and delay²⁹ inherent in a de novo trial. If variances are denied, appellant has received a final determination by the County which is based upon full disclosure of the nature of appellant's hardship claims. Thus, the variance record and findings will present the "hardship" facts in a concrete way.

In contrast, if appellant can institute a de novo judicial proceeding without first seeking variances, the County and City will be subjected to great hardship. Evidence of economic hardship is uniquely within the property owner's control. Without this evidence, a public entity can only guess at the validity of the owner's claims. There is no excuse for the owner's failure to present all of its hardship evidence at the administrative level. A contrary approach will emasculate the ability of public agencies to intelligently administer their land use regulations in light of property owners' "taking" claims.

3. Under the property's zoning, appellant has many permitted and conditionally permitted non-agricultural uses. Appellant's claim that denial of Map No. 2462 relegates the property to "only" agricultural use is wrong as a matter of law and is, therefore, not admitted by demurrer. *Agins*, 447 U.S. at 259 n.6. The allegation fails for two independent reasons. First, as a matter of law, the zoning ordinance permits non-agricultural uses. (J.A. 133.) Second, as a matter of law, many of such

²⁹ Appellant can hardly complain of delay by pursuit of variances since appellant's own tardiness has substantially delayed resolution of both the administrative and judicial proceedings. See *supra* notes 6, 14, 21.

uses do not depend upon subdivision approval. (*See supra* note 6; and *infra* Point III.A.1. of our Argument.)

The County zoning regulations were judicially noticed. (R.T. 134-35.) Portions of the property are zoned R-1 (32.99 acres), R-2 (3.4 acres), R-3 (2.11 acres) and R-4 (3.56 acres). (J.A. 44 ¶ 8, 67.) The uses permitted or conditionally permitted in these zoning classifications are extensive. (J.A. 141-47.)

Appellant ignores the uses permitted under the property's existing zoning altogether. Instead, the complaint addresses, in conclusory fashion, uses permitted in one of the County's three agricultural zones (A-E) (J.A. 52-58; Supp. C.T. 40-54), a zone which is inapplicable to the property. (J.A. 44 ¶ 8.) Appellant apparently justifies this slight of hand by its conclusory allegation that denial of Map No. 2462 relegated the property to "only" agricultural use. Appellant takes this to the extreme of selecting the precise agricultural zone to which appellant has, *ipse dixit*, "rezoned" itself.⁴⁰

Contrary to appellant's conclusory allegations, the property's zoning establishes the available uses as a matter of law. Appellant has advanced no plausible excuse for its refusal to pursue legally available non-agricultural uses.

4. Finally, even if the zoning ordinance uses are disregarded and even if appellant's conclusory allegation that denial of Map No. 2462 has relegated the property to "only" agricultural use is, *arguendo*, accepted as true, there is still no ripe claim because state law provides avenues for obtaining relief from the County. Appellant has ignored available avenues for relief which include applications to the County (1) for reassessment of the

⁴⁰ This self-assignment to an agricultural zoning classification is also relied upon by appellant to excuse itself from the duty of seeking a variance. (Brief for Appellant at 30-31; Brief Opp. Mtn. to Dismiss at 6-7.)

sewer and drainage assessments,⁴¹ or (2) for reduction in taxes assessed against the property,⁴² or (3) for entry into an "agricultural preserve contract," thereby qualifying for special property tax treatment.⁴³ Thus, appellant's allegations of the agricultural unsuitability of the property fail to articulate a ripe controversy.

For all of the foregoing reasons, appellant has failed to factually plead finality. Appellant has ignored available avenues for administrative relief. There is no concrete determination upon which a taking analysis can proceed.

III. THE DENIAL OF APPELLANT'S TENTATIVE SUBDIVISION MAP DID NOT "TAKE" APPELLANT'S PROPERTY.

The complaint does not state facts sufficient to constitute a "taking" because (a) development uses are available as a matter of law on the project site; (b) the "taking" allegations only address the proposed subdivision site, and not appellant's parcel as a whole; and (c) no cognizable property right has been destroyed.

This Court has stated that "no precise rule determines when property has been taken" (*Agins*, 447 U.S. at 260-61), but that a "taking" is more readily found when the interference with property can be characterized as a physical invasion by government. *Penn Central Transportation Co.*, 438 U.S. at 124. Where government physically invades private property, just compensation must be paid. *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962); *Kaiser*

⁴¹ Cal. Sts. & Hy. Code §§ 5500-11, 5550-65 (West 1969 & Supp. 1986); *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979), *cert. den. & appeal dismissed*, *Webber v. City of Sacramento*, 444 U.S. 976 (1979).

⁴² Cal. Const. art. XIII, §§ 1, 16 (West Supp. 1986); Cal. Rev. & Tax. Code §§ 1601-13 (West 1970 & Supp. 1986).

⁴³ Cal. Const. art. XIII, § 8 (West Supp. 1986); Cal. Gov't Code §§ 51200-98 (West 1983 & Supp. 1986); Cal. Rev. & Tax. Code §§ 402.1 (West Supp. 1986), 421-30.5 (West 1970 & Supp. 1986).

Aetna v. United States, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Appellant has not alleged that appellees physically invaded its property.

The mere assertion of regulatory jurisdiction by a governmental body does not constitute a "taking." *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. at 293-97. Government regulations by definition involve the adjustment of rights for the public good, and this adjustment often curtails some potential use or economic exploitation of private property. *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

In *Agins*, 447 U.S. at 260, this Court stated that the application of a general zoning law to a particular property effects a "taking" if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. A denial of a permit may constitute a "taking" only if its effect is to prevent all economically viable use. *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. at 459. Where the government action does not interfere with distinct interests which are sufficiently bound up with reasonable expectations to constitute "property" under the fifth amendment, a "taking" is not stated. *Penn Central Transportation Co.*, 438 U.S. at 124-25.

The California Court of Appeal held that a "taking" ⁴⁴ had not been stated under the fifth and fourteenth amendments, or under 42 U.S.C. § 1983.⁴⁵ (J.A. 125, 133, 135.)

⁴⁴ Appellees use the "taking" term in a figurative sense, so as to encompass an action brought under the due process clause. See *infra* Point IV of this Brief.

⁴⁵ The United States has seriously misconstrued the Court of Appeal's decision. The government claims the Court of Appeal did not determine whether the complaint states facts sufficient to constitute a "taking" under 42 U.S.C. § 1983. (Brief of the United States at 27, 28.) This misconception is unexplainable in light of the government's recognition that the Court of Appeal in fact held

A. The allegations in appellant's complaint are similar to those made in *Agins*. Appellants in *Agins* alleged that the City, by rezoning their land, had forever prevented its development for residential use (447 U.S. at 258), and had completely destroyed its value. (*Id.*) This Court upheld the City's demurrer holding that the City ordinance on its face did not "take" appellants' property because the California Supreme Court found as a matter of state law that the zoning regulations permitted the construction of up to five buildings on the property. (*Id.* at 259.)

The California Court of Appeal in our case subjected appellant's complaint to the same review applied by the California Supreme Court in *Agins*. Like the appellants in *Agins*, appellant here has conclusorily alleged that denial of the tentative subdivision map application has deprived it of any beneficial use or value. (J.A. 60 ¶ 33.) As did the California Supreme Court in *Agins*, 447 U.S. at 259 n.6, the Court of Appeal rejected appellant's allegations which conflicted with the Board's determination, judicially noticed facts, or with the exhibits attached to the complaint. The Court of Appeal found that the facts

that the complaint did not allege facts sufficient to constitute a cause of action under the Civil Rights Act because all development had not been denied. (*Id.* at 9.) (See J.A. 135.) Accordingly, there is no need for remand to consider this issue as it was decided by the Court of Appeal.

This Court has stated that in order to state a claim under § 1983 the complaint must *factually* allege a constitutional deprivation committed under color of law. *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *rev'd* on other grounds, *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978). Section 1983 suits brought in federal courts must allege *particular facts* showing the constitutional deprivation, and that such actions were committed under color of law. See *Burgess v. City of Houston*, 718 F.2d 151, 154 (5th Cir. 1983); *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981); *Kennedy v. H & M Landing, Inc.*, 529 F.2d 987, 989 (9th Cir. 1976). The Court of Appeal reviewed the complaint applying California procedural law, and found that the *facts* as alleged in the § 1983 cause of action did not state a "taking." (J.A. 125, 135.)

before it showed that denial of the tentative subdivision map did not preclude appellant from all viable use, and that as a matter of state law valuable development was permitted on appellant's property. (J.A. 133-35.) Appellant therefore, like the appellants in *Agins*, failed to state a "taking".

Although appellant alleges that the development plan it proposed was the highest and best use for the property. (J.A. 61 ¶ 36), such an allegation does not constitute a "taking." *Penn Central Transportation Co.*, 438 U.S. at 125; *Andrus v. Allard*, 444 U.S. at 66; *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962). Courts instead focus on the uses permitted by government regulations in determining whether a "taking" has been stated. *Penn Central Transportation Co.*, 438 U.S. at 131.

Denial of Map No. 2462 has "taken" nothing from appellant. This is so because (1) a subdivision map is unnecessary for many permitted non-agricultural uses, and (2) denial of one specific plan based upon specifically articulated objections is not a denial of all use.

1. In California, property may be developed and used for non-agricultural purposes without subdividing. The Subdivision Map Act only applies where the developer desires to subdivide the property for "sale, lease or finance." (Cal. Gov't Code § 66424 (West 1983).) The Map Act, however, does not apply to the "financing or leasing of apartments, offices, stores or similar space within apartment buildings, industrial buildings, commercial buildings, mobilehome parks, or trailer parks." (Cal. Gov't Code § 66412(a) (West Supp. 1986).) Nor does the May Act apply to the financing or leasing of any parcel of land in conjunction with the construction of commercial or industrial buildings on a single parcel. (Cal. Gov't Code § 66412.1 (West 1983).)

The zones on appellant's property are R-1, R-2, R-3, and R-4. (J.A. 67). A wide variety of residential, apart-

ment, office, professional and similar non-agricultural uses are permitted in these zones.⁴⁶

Apartment buildings may be constructed and individual apartments leased on appellant's property in the R-3 and R-4 zones without a subdivision map as a matter of state law. See *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal.3d 633, 642-43, 94 Cal.Rptr. 630, 484 P.2d 606 (1971), appeal dismissed, 404 U.S. 878 (1971) (discussion of construction of apartment buildings without subdivision).⁴⁷

As stated, commercial office buildings also may be developed and leased on appellant's property in the R-3 and R-4 zones without subdividing the property. (J.A. 144-47; Cal. Gov't Code §§ 66412(a) (West Supp. 1986), 66412.1, 66424 (West 1983).) Commercial densities in

⁴⁶ See listing of principle, conditional and accessory uses in Yolo County Code Zoning Regulations §§ 8-2.802, 8-2.803, 8-2.804, 8-2.902, 8-2.903, 8-2.904, 8-2.1002, 8-2.1003, 8-2.1004, 8-2.1102, 8-2.1103, 8-2.1104. (J.A. 141-47.) Principal uses only require site plan approval. (Yolo County Code Zoning Regulations § 8-2.299.25; J.A. 139.) Conditional uses include a principal or accessory use which requires a use permit. (Yolo County Code Zoning Regulations § 8-2.299.23; J.A. 139.) Crop and tree farming are permitted uses in all zones. (Yolo County Code Zoning Regulations § 8-2.2402; J.A. 147.)

⁴⁷ The United States, without citation to any specific County ordinance, mistakenly asserts that only one building is permitted per lot in the R-3 and R-4 zones. (Brief of the United States at 3 n.2.) While this statement is true with respect to the areas of the R-1 and R-2 zones (J.A. 141-42), it is not true with respect to the areas of the R-3 and R-4 zones. Not only do the R-3 and R-4 zones permit a residential unit per designated feet of lot area (Yolo County Code Zoning Regulations §§ 8-2.1006(g), 8-2.1106(g); Supp. C.T. 63, 65), these zones require that buildings on the same lot be separated by specified distances. (Yolo County Code Zoning Regulations §§ 8-2.1006(h), 8-2.1106(h); Supp. C.T. 63, 65.) Similar provisions are not included within the R-1 and R-2 zones. (Supp. C.T. 57-61.)

the R-3 and R-4 zones are controlled by the height, setback and parking requirements of the zoning ordinances.⁴⁸

As in *Agins*, the California courts judicially noticed these uses. (R.T. 134-35; J.A. 132-33, 135.) As a matter of law, these facts absolutely negate appellant's conclusory allegations that it has been denied all economic use of its property (J.A. 60 ¶ 33), or that its property has been restricted to agricultural use. (J.A. 51 ¶ 24.)

2. Denial of only one specific development proposal for specific deficiencies is not a taking of all uses. In *Penn Central*, two separate plans to construct an office building atop Grand Central Terminal were denied. In finding no "taking," the Court stated: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." (438 U.S. at 130.)

Likewise, appellant has not stated a "taking" here. The mere fact that appellant's proposed 159 lot subdivision was denied as submitted cannot constitute a "taking." Appellant has not been precluded from developing its property. The Court also found in *Penn Central* that the denial of one specific use does not constitute denial of all uses. (*Id.* at 137.) See *Williamson County Regional Planning Commission*, 105 S.Ct. at 3117. Appellant, however, has brought suit claiming its proposal must be approved as submitted, or government is required to pay damages. To accept this proposal would compel government to regulate by purchase. *Andrus v. Allard*, 444 U.S. at 65.

In *Andrus v. Allard*, 444 U.S. at 65-66, the Court found that the destruction of one strand in the bundle of property rights does not constitute a "taking." Appellant

⁴⁸ Yolo County Code Zoning Regulations §§ 8-2.1005, 8-2.1006, 8-2.1007, 8-2.1105, 8-2.1106, 8-2.1107. (Supp. C.T. 63-65.)

here can sell, maintain possession, or use its property for agriculture or development; it has only been denied one very specific development proposal for the property. All development has not been precluded.

Government regulations have been sustained against a "taking" claim where the regulations protected the public health, welfare and safety, even though the regulations prohibited the existing beneficial use on the property or substantially reduced the value of the property. *Mugler v. Kansas*, 123 U.S. 623 (1887); *Atlantic Coast Line Railroad v. City of Goldsboro*, 232 U.S. 548 (1914); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Miller v. Schoene*, 276 U.S. 272 (1928); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The County Board specifically found that appellant's project as proposed involved significant adverse environmental impacts (J.A. 72; Appendix A), and posed a real and substantial danger to the public health. (J.A. 77 ¶ C.) See Cal. Gov't Code § 66474 & note 6, *supra*.

The facts before this Court do not show that appellant has forever been denied development uses on its property.⁴⁹ The facts instead show that appellant as a matter of state law can develop without submitting a subdivision

⁴⁹ Appellant cannot claim that development is infeasible because of City's refusal to accept dedication of an extension of Cowell Boulevard to its property. (J.A. 49-50 ¶ 21.) Road access outside of the City as well as variances to County's requirement of a public road were available. (See *supra* text at 26-27.) Sewer service was also available to appellant upon annexation to the CSA.

In reviewing appellant's map, County applied its policy that governmental services required by a subdivision contiguous to a city should be provided by that city. (J.A. 75 ¶ 12.) As indicated by its findings, however, the Board evaluated all the services proposed for the subdivision, whether or not they were to be provided by the City or another entity. (J.A. 71-80.)

map. Appellant can also develop by subdivision upon submission of a map which by design or variance addresses the deficiencies found by the Board.⁵⁰

B. Even if we assume, arguendo, the truth of appellant's conclusory allegations that "the property" has been denied its entire economic value and beneficial use (J.A. 60 ¶ 33), a "taking" has still not been stated. This is because "the property," as designated by appellant, is merely one segment in a 148 acre tax parcel. (C.T. 1369.)

In *Penn Central*, this Court found that a landowner cannot divide his parcel of land into discrete segments in order to state a "taking." The Court stated:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

438 U.S. at 130-31.

⁵⁰ Appellant baldly claims that if its tentative map was deficient, the County should have approved it with conditions. (Appellant's Brief at 7 n.12). Yet a tentative map cannot be approved unless the design (Cal. Gov't Code § 66418 (West Supp. 1986)) and improvement (Cal. Gov't Code § 66419 (West Supp. 1986)) are consistent with the general plan. (Cal. Gov't Code § 66473.5 (West Supp. 1986).) CEQA requires an accurate description of the "whole" project as well as project alternatives and feasible mitigation measures. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193, 139 Cal.Rptr. 396 (1977).) Open-ended conditions would not fulfill this description requirement and would subject the project to invalidation because of an inadequate EIR. (*Id.*) While conditions may be imposed on a tentative map where minor changes will resolve the deficiency, there is no requirement under California law that government redesign the developer's project to make it acceptable. *Bell Mar Estates v. California Coastal Comm'n*, 115 Cal.App.3d 936, 942, 171 Cal.Rptr. 773 (1981).

The trial court judicially noticed records of the County assessor. (R.T. 118.) These records show that tax parcel 33-290-56 which includes "the property" consists of 148.39 acres. (C.T. 1369.) Most of the proposed subdivision is located within the westernmost 38 acre rectangle of this tax parcel.⁵¹ Appellant has not alleged that its tax parcel as a whole is valueless or without beneficial use; instead, it has limited its allegations solely to the proposed subdivision site. In doing so it has alleged exactly what this Court in *Penn Central* stated could not be done; it is claiming a "taking" of a discrete segment of a larger parcel. To state a "taking" however, appellant must factually allege a "taking" of its parcel as a whole.⁵² *Penn Central Transportation Co.*, 438 U.S. at 130-31.

⁵¹ A copy of Exhibit B to appellant's complaint (J.A. 68) has been marked to show this tax parcel and is Appendix D of this Brief.

Appellant conceded in the trial court that assessor's parcel 33-290-56 included the proposed subdivision site and the 108 acre tract. (C.T. 1646.) Apparently recognizing the flaw in its claim, appellant sought court approval to retract its request for judicial notice of the assessor's records. (C.T. 1645.) Appellant's request for retraction was not granted by the trial court. Appellant also conceded that the small western extension of the proposed subdivision property is a separate parcel of 4.177 acres. (C.T. 1646.)

⁵² Appellant is also prevented from segregating out "the property" and alleging a "taking" because the 44 acre tract, the 108 acre tract and the connecting property must all be treated as one parcel for inverse condemnation purposes. In eminent domain law a tract of land which has been used and treated as an entity will be considered as such in assessing damages for a "taking." *United States v. Miller*, 317 U.S. 369, 375-76 (1943); *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 330, 99 Cal.Rptr. 21, 491 P.2d 813 (1971); *County of Santa Clara v. Curtner*, 245 Cal.App.2d 730, 736, 54 Cal.Rptr. 257 (1966). Since inverse condemnation is merely an action brought by the landowner instead of the government (*see Agins*, 447 U.S. at 258 n.2), a parcel for "taking" purposes also includes property which is contiguous and has been treated as an entity. Appellant's properties meet these requirements (*see discussion supra* in text at 5-7), and must, therefore, be viewed as a whole. Appellant, however, has not factually alleged a "taking" of these properties as a whole.

C. The denial of appellant's subdivision map has not "taken" a property right requiring just compensation. A "taking" will not be found where the government action did not interfere with a property interest under the fifth amendment even though economic harm results. See *Penn Central Transportation Co.*, 438 U.S. at 124-25. Property rights protectible under the "takings" clause are not created by the Constitution, but instead are created and defined by state law. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2872 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). The denial of appellant's tentative map has not destroyed an existing right.

1. Under state law, a landowner has no vested right in existing or anticipated zoning ordinances. *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 516, 125 Cal. Rptr. 365, 542 P.2d 237 (1975), cert. denied, 425 U.S. 904 (1976). See *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 796, 132 Cal.Rptr. 386, 553 P.2d 546 (1976). Nor does a developer have a vested right to develop property and construct a building on that property unless a building permit has been issued, and the developer has made substantial expenditures in reliance on the building permit. *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal.3d 858, 864, 201 Cal.Rptr. 593, 679 P.2d 27 (1984); *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976).⁵³ Appellant, of course, has not alleged reliance on any prior building per-

⁵³ The California vesting rule as outlined in the cited cases is still the law. The legislature has, however, enacted specific procedures to obtain earlier vesting. In 1979, the legislature enacted procedures for developers and local agencies to enter into "development agreements." (Cal. Gov't Code §§ 65864-69 (West 1983 & Supp. 1986).) Development agreements "vest" the local agency's development rules, regulations and policies governing land use, density, design, improvement and construction standards for the term of the agreement so long as the developer performs its obligations. (Cal. Gov't Code § 65866 (West 1983).) Such developer obligations can include financing, reimbursement and construction of public facilities to serve the development, including streets, sewer-

mit approval. This fact destroys any argument that it has acquired any state recognized property right.⁵⁴

Nor can appellant claim that the payment of sewer assessments gives appellant a state law property right to subdivide in contravention of the Map Act. The sewer assessments paid by appellant were for a sewage treatment plant which was later abandoned because of increased sewer discharge requirements. (See *supra* note 19.) Sewer service was available during the operational life of this plant. However, under California law, a property owner in a sewer assessment district has no vested right that the sewer improvements will perpetually remain in the same form, or that they will not be changed or abandoned. *Ritzman v. City of Los Angeles*, 38 Cal. App.2d 470, 101 P.2d 541 (1940). If appellant felt its assessments were unfair, it could have sought reduction of these assessments under state law. (Cal. Sts. & Hy. Code §§ 5500-11, 5550-65 (West 1969 & Supp. 1986).) Appellant saw fit not to pursue this remedy. (J.A. 119, 129.)

Notwithstanding the fact that the sewer plant for which appellant paid assessments was abandoned, the County Board determined that appellant's property could be served by the El Macero interceptor line upon annexation to the CSA. (J.A. 75 ¶¶ 9, 11.) Appellant never instituted any proceedings to annex to the CSA. (*Id.* at ¶ 11.)

Appellant purchased this agricultural property with the speculative hope that some day it would be permitted to

age, drinking water and utility facilities. (Cal. Gov't Code §§ 65864, 65865, 65865.2 (West Supp. 1986).)

In 1984, the legislature enacted a "vesting tentative map" procedure within the Map Act which became effective on January 1, 1986. (Cal. Gov't Code §§ 66498.1-98.8 (West Supp. 1986).) Approval of a vesting tentative map by a local agency "vests" a right to proceed with development for specified periods of time in accordance with the conditions of approval and with existing land use policies. (Cal. Gov't Code §§ 66498.1, 66498.6 (West Supp. 1986).)

⁵⁴ See *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984). (Reasonable investment backed expectations existed where state law recognized trade secrets as a property right and the government gave an explicit statutory guarantee.)

develop the property. Appellant knew that it would have to obtain approval of the County for any subdivision development proposal, and that such proposal would have to comply with the Map Act.⁵⁵ In light of this existing statutory framework, appellant cannot claim a reasonable expectation that payment of sewer assessments guaranteed it approval of any subdivision plan it proposed. The only reasonable expectation flowing from these payments was hook-up to the sewer facility that was ultimately abandoned. Appellant's speculative expectation that a particular tentative subdivision map would be approved is not based upon a property right, but is based solely upon a unilateral expectation and abstract need. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2875.

Not all economic uses or advantages are property rights. Only those which are recognized as such by state law are given fifth amendment protection. *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945). A recognition by this Court that a speculative interest constitutes a protected property right will make government the guarantor of a developer's risk.⁵⁶ California has specifically found that a right to develop does not mature until a property owner has expended a substantial amount in reliance on a building permit. See *Arco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976). The denial of appellant's map merely confirms the current value and available uses on the property, it neither adds nor subtracts from the existing rights held by appellant.

2. Appellant's complaint does not allege deprivation of access to its property which is cognizable as a state recognized property right.⁵⁷ A property owner in California

⁵⁵ The Map Act (Cal. Gov't Code § 66410 *et seq.*) was initially codified by 1943 Cal. Stat. 128, p. 865, § 1.

⁵⁶ See *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548-49 (9th Cir. 1984), *cert. den.*, 105 S.Ct. 2705 (1985) (denial of use permit).

⁵⁷ There is no constitutional requirement that the City agree to extend its public streets or any other municipal service. See *Amicus*

has a right to existing access; elimination of existing road access under California law is compensable in inverse condemnation. *Jones v. People ex rel. Department of Transportation*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978).⁵⁸ The Court of Appeal, applying California law, specifically held that appellant had not been denied existing access. (J.A. 133-34.) The court also held that there is no state property right to extension and dedication of a public roadway. (J.A. 134.) The Court of Appeals' application of state law does not present a federal question which is reviewable in this Court. *Agins*, 447 U.S. at 259 n.6.

IV. INVALIDATION, NOT DAMAGES, IS THE PROPER REMEDY FOR A TEMPORARY UNCONSTITUTIONAL LAND USE REGULATION.

Appellees contend that the remedy for a temporary unconstitutional land use regulation is invalidation of the regulation under the due process clause, not recovery of damages under the fifth amendment.⁵⁹ Because the damage remedy is not constitutionally required, neither is it required under 42 U.S.C. § 1983.⁶⁰ Past decisions of this

Briefs in support of Appellees. The relationship of the City and CSA boundaries to the subdivision site is shown by a recent aerial photograph (not a part of the record) to which we have added boundary lines taken from various exhibits in the record. (See Appendix E.) The facts disclosed by Appendix E are not reasonably subject to dispute. (Cal. Evid. Code §§ 452(g), (h), 459 (West 1966).)

⁵⁸ The cases cited by appellant are inapposite. (Appellant's Brief at 15 n.20.) *Rose v. State of Cal.*, 19 Cal.2d 713, 123 P.2d 505 (1942) held that physical construction on a public roadway interfering with existing access to property fronting the roadway was compensable. *United States v. Welch*, 217 U.S. 333 (1910) and *United States v. Smith*, 307 F.2d 49 (5th Cir. 1962) held that physical destruction of existing road access was compensable.

⁵⁹ See Brief *amici curiae* of Nat'l Assoc. of Counties, *et al.*

⁶⁰ 42 U.S.C. § 1983 does not require a damage remedy for every constitutional deprivation. This Court has specifically held that a damage remedy may be defeated where special factors counsel against it. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Carlson v. Green*, 446 U.S. 14, 18 (1980); *Bivens v. Six Unknown*

Court establish that the police power is separate and distinct from the power of eminent domain. *Sweet v. Rechel*, 159 U.S. 380, 398-99 (1895). When the police power reaches a certain magnitude, "there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (emphasis added). Absent payment of compensation, the regulation is invalidated. Invalidity is the historical remedy for arbitrary government regulation, not an action for damages. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166 n.12 (1958).

Justice Brennan argues that damages are constitutionally required for the period commencing on the date that the regulation first effected the "taking," and ending on the date that the regulation is rescinded. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting).⁶¹ Damages cannot be

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971).

Where state remedies are adequate to satisfy due process, there is no cause of action under § 1983. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Williamson County Planning Comm'n v. Hamilton Bank*, 105 S.Ct. at 3121-22 (1985). Additionally, state remedies need not provide all the relief available under § 1983, they need only be adequate. *Parratt*, 451 U.S. at 544. Since the fifth amendment does not require a damage remedy for a temporary unconstitutional land use regulation, a state remedy providing for invalidation of the regulation satisfies due process. Appellant's mandate action is an adequate remedy.

⁶¹ Justice Brennan's interim damage approach contains a myriad of practical problems including the measure of damages to be awarded, as well as determining what damages are attributable to enactment of the unconstitutional regulation. This case presents a prime example of these concerns. Appellant has amended its complaint four times. All of these amendments, except the first, were initiated solely by appellant. Appellant did not include the fifth and fourteenth amendments in its allegations until October 1981, four years after its initial complaint was filed. (J.A. 42-66.) Additionally, this case remained inactive for two and one-half years while appellant awaited this Court's decision in prior cases. (J.A. 18-20.) An interim damage award in this case would reward appellant for delaying its case. For a discussion of these and other concerns, see Williams, Smith, Siemon, Mandelker, and Babcock, *The White*

constitutionally required for this interim period however, because temporary interference with use of land during the decision-making process (administrative and judicial) is not a "take" within the meaning of the fifth amendment's just compensation clause.

Government regulations by their very nature have an impact on the increase or reduction of property values. Mere fluctuations in value are "incidents of ownership" and "cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939). See *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S.Ct. at 3126 (1985) (Stevens, J., concurring); *Agins v. City of Tiburon*, 447 U.S. at 263 n.9; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. This Court has repeatedly held that a mere diminution in property value does not constitute a "take." (See *supra* text at III.A.2.) An interim damage rule would violate this well established constitutional doctrine.⁶²

Additionally, a temporary interference with use of property during the decision-making process does not de-

River Junction Manifesto, 9 Vt. L. Rev. 193, 223-25 (1984); Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 Ind. L. J. 113, 135 n.112 (1984).

⁶² Appellant does not seek interim damages in this action. It seeks only a forced purchase of its property based upon its claims of permanent deprivation. (J.A. 60 ¶¶ 33, 34; 61 ¶ 37.) In its Brief, appellant advances the tautology that "perpetuation" of a restriction is equivalent to a "permanent" restriction and suggests that this condition is attributable to the County. (Brief for Appellant at 17 n.24.) There are two basic flaws here. First, it is appellant, not the County, which has refused to pursue its invalidation remedy. (R.T. 53 line 5—54 line 16.) Second, the still pending mandate action bears directly upon appellant's present claim of permanent deprivation. Successful pursuit of the mandate remedy would terminate the restriction and moot appellant's claim of permanent deprivation. Since the pending mandate action may obviate appellant's permanent deprivation claim here, this appeal is not from a final judgment within the meaning of 28 U.S.C.A. § 1257(2) (West 1966.) *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

stroy a landowner's full bundle of property rights. Property not only has present value, it also has value over time. An interference with present use only affects one stick in the bundle of rights. Yet, this Court has held that destruction of one strand in the bundle of property rights is not a "taking." *Andrus v. Allard*, 444 U.S. at 65-66. See *Penn Central Transportation Co.*, 438 U.S. at 130. Interim damages, therefore, are not supportable under the fifth amendment.

Contrary to the exhortations of appellant's amici, the invalidation remedy will not compel the dismantling of complex statutory schemes if a court finds the statutes to be unconstitutional as applied. Land use regulations which are unconstitutional as applied to a particular landowner are only invalidated as applied to that landowner, they are not struck down as a whole.

Invalidation, with retention of jurisdiction by the trial court, ensures that a court's finding of unconstitutionality will be obeyed.⁶³ It also permits the governmental entity

⁶³ Appellant and its amici have portrayed the California courts and the invalidation remedy discussed in *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, in an extremely unfair and incomplete fashion. There is no shortage of reported California cases where the interests of property owners and developers have prevailed against excessive regulations or governmental overreaching.

In numerous cases, police power restrictions have been invalidated as excessive. The following are representative:

San Leandro Rock Co. v. City of San Leandro, 136 Cal.App.3d 25, 185 Cal.Rptr. 829 (1982) (Invalidation as "excessive" of city vehicle weight limitation ordinance as applied to quarry operator whose only practical route to market its product was thereby eliminated. The court relied upon the California Supreme Court's *Agins* decision.); *North Sacramento Land Co. v. City of Sacramento*, 140 Cal.App.3d 576, 189 Cal.Rptr. 739 (1983) (Demurrer improper where zoning ordinance amendment eliminated sand and gravel extraction as a conditional use. The owner claimed the eliminated use was the only viable use of flood plain property. The case was remanded for trial on the owner's declaratory relief cause of action.); *Arnel Dev. Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 178 Cal.Rptr. 723 (1981) (A voter enacted initiative downzoning specific property was invalidated as discriminatory, arbitrary and

to decide whether to accept invalidation of its regulation, or whether to exercise its eminent domain power and pay

capricious.); *Hoshour v. County of Contra Costa*, 203 Cal.App.2d 602, 21 Cal.Rptr. 714 (1962) (Zoning setbacks declared unconstitutional as applied to plaintiff's property. Since a prior variance request was denied, the owner was not required to make further variance requests.); *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979), cert. den. & appeal dismissed, *Webber v. City of Sacramento*, 444 U.S. 976 (1979) (Open space zoning ordinance could not preclude use of sewer facilities paid for by owner through sewer assessments. The City was given the option to either refund the assessments or permit development without regard to the open space ordinance.); *Mid-Way Cabinet, etc. Mfg. v. County of San Joaquin*, 257 Cal.App.2d 181, 65 Cal.Rptr. 37 (1967) (Writ of mandate issued to compel County issuance of a use permit free of invalid dedication conditions, citing this Court's decision in *Pennsylvania Coal Co. v. Mahon*.); *Liberty v. California Coastal Comm'n*, 113 Cal.App.3d 491, 170 Cal.Rptr. 247 (1980) (Writ issued to compel issuance of permit free from unconstitutional dedication requirement.); *Scrutton v. County of Sacramento*, 275 Cal.App.2d 412, 79 Cal.Rptr. 872 (1969) (Street dedication conditions for rezoning must be reasonably necessary to serve the project. Excessive exactions are invalid.); *Kissinger v. City of Los Angeles*, 161 Cal.App.2d 454, 327 P.2d 10 (1958) (Emergency downzoning within airport flight path held invalid as arbitrary and discriminatory.); *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976) (Voter rent control initiative held facially invalid because the ordinance process for addressing property owner applications for rent adjustments had built-in delays which inherently denied due process.).

Where a public agency utilizes its police power in anticipation or in aid of the power of eminent domain, the California courts are quick to sustain a damage remedy for inverse condemnation. The following cases are illustrative:

Klopping v. City of Whittier, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972) (Unreasonable precondemnation delay or other unreasonable precondemnation conduct gives rise to damage remedy.); *Jones v. People ex. rel. Dept. of Transportation*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978) (County's denial of subdivision map and of access from abutting street in reliance on State freeway plans entitled owners to damages from state.); *Peacock v. County of Sacramento*, 271 Cal.App.2d 845, 77 Cal.Rptr. 391 (1969) (County height restriction ordinance and other actions "freezing" the use of property, for a period of more than five years, near a private airfield which the County planned to acquire was held to be inverse condemnation.); *Sneed v. County of Riverside*,

just compensation. In the rare and egregious case where government acts in contravention of the court's decision or enacts new restrictive regulations aimed at the same landowner after a court's ruling of unconstitutionality, money damages under § 1983 would be available. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

CONCLUSION

For the foregoing reasons, appellees County of Yolo and City of Davis respectfully request that the judgment of dismissal be affirmed.

218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963) (Demurrer to inverse condemnation complaint improperly sustained where County adopted restrictive height ordinance applicable to properties adjoining County airport.).

The California courts have also invalidated land use regulations which were discriminatory to low income persons or which fail to balance regional with local needs. The following cases are illustrative:

Associated Home Builders Etc. Inc. v. City of Livermore, 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976) (Upholding facial validity of voter enacted building permit moratorium but announcing active judicial scrutiny of the competing regional and local welfare interests impacted by growth limitation ordinances.); *G & D Holland Constr. Co. v. City of Marysville*, 12 Cal.App.3d 989, 91 Cal.Rptr. 227 (1970) (Motion for summary judgment improperly granted to the City where there was a triable issue of fact as to plaintiff's claim that downzoning was motivated by the nature of plaintiff's low-income, federally assisted apartment project.); *Stocks v. City of Irvine*, 114 Cal.App.3d 520, 170 Cal.Rptr. 724 (1981) (Liberal standing rules permit low-income nonresidents to challenge adequacy of City's land use regulations as exclusionary in contravention of state statutes requiring city regulations to make "provision for the housing needs of all economic segments of the community."); *Lee v. City of Monterey Park*, 173 Cal.App.3d 798, 219 Cal.Rptr. 309 (1985) (Cause of action stated against City's voter enacted growth initiative under the *Associated Home Builders* balancing test and recent statutes shifting the burden of proof in regard to growth limitation ordinances.).

The above cited California authorities are illustrative. The list is by no means exhaustive.

Respectfully submitted,

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APPENDIX A**FINAL ENVIRONMENTAL IMPACT REPORT**

"SUMMARY OF ENVIRONMENTAL IMPACTS & THEIR DISPOSITION"—INCORPORATED BY REFERENCE IN BOARD'S DETERMINATION AND FINDINGS (J.A. 72 ¶ C.1).)

V. Summary of Impacts and Their Disposition**A. Summary of Adverse Impacts**

The impacts of this project are listed on Pages 31, 32, 33, 34, 35, 36, and 37 of this report. The most significant adverse impacts are listed below:

1. Natural Environment**a. Geologic and Pedalogic Conditions**

1) The project will remove 40 acres of prime agricultural land from future productivity.

2) The project will stimulate development of the 57 acres of agricultural lands intervening between subject site and the existing city development to the west.

b. Hydrologic Conditions

1) The creation of impervious surfaces on approximately 59% of the site will increase both the amount and rate of surface water runoff.

2) Additional taps on the underground water supply will effect the ground water storage capacity of the vicinity around the project.

3) Interconnection with existing water systems in the area could reduce existing water quality as to total solids and hardness.

c. Atmospheric Conditions

1) The development will have a mycro affect on climate.

2) The occupancy of the development and vehicular trips generated thereby will affect local and regional air quality due to automobile-produced pollutants affecting an area already described as sensitive by the Air Pollution Control District.

d. Vegetation and Wildlife

1) Development of the site will eliminate present agricultural habitats.

2) The development will eliminate all vegetative species from the site including agricultural crops currently grown.

2. Social, Cultural and Social-Economic Factors

a. Cultural Resources

1) There is a possibility that some Patwin burial sites exist on the project area and would be covered up by construction.

b. Energy Use and Conservation

1) The development will consume additional gas and electricity, both of which are reported to be in short supply with present demands.

2) The project thus far has not reflected design consideration for maximization of building orientation to produce energy conservation.

c. Population

1) The project could involve a population of 903 individuals based on existing trends in the Davis area.

2) Development of the intervening 57 acres forced by this project could result in approximately doubling that population and the impacts thereof in this area.

d. Land Use

1) The project would eliminate the current agricultural use of the 44 acres involved and would have

a direct effect on the 57 acres intervening between it and the existing city development. The project would bring urbanization closer to the adjacent 111 acres of farm land owned by developers and proposed for subdivision, further limiting its agricultural potential.

2) Development of this project in the county and outside of the city limits would violate current county policy which promotes development within the urbanized areas of cities.

3) The project would impact other areas within the city limits that are now designated for development. The City of Davis has indicated that any additional units built here in the County would create an improperly balanced housing market and substantially subvert the adopted Davis General Plan.

e. Public Facilities

1) The project will substantially add to the requirement for public facilities including animal control, fire prevention, public utilities, mosquito control, police protection, schools, solid waste disposal, sewage disposal, water supply, drainage, parks, and street maintenance.

2) Costs incurred for increased services required by this project are expected to be handled by special district annexation or formation or by private homeowners association. Such proposals conflict with existing policies in the area of district formation and deter efficient provision of urban services.

APPENDIX B

CALIFORNIA GOVERNMENT CODE (Excerpts—
West 1983 & Supp. 1986)

TITLE 5. LOCAL AGENCIES

Division 3. Cortese-Knox Local Government Reorganiza-
tion Act of 1985. §§ 56000-57425.¹§ 56001. Legislative findings and declarations; boundaries
consolidation

The Legislature finds and declares that it is the policy of the state to encourage orderly growth and development which are essential to the social, fiscal, and economic well-being of the state. The Legislature recognizes that the logical formation and determination of local agency boundaries is an important factor in promoting orderly development. Therefore, the Legislature further finds and declares that this policy should be effected by the logical formation and modification of the boundaries of local agencies.

The Legislature recognizes that urban population densities and intensive residential, commercial, and industrial development necessitate a broad spectrum and high level of community services and controls. The Legislature also recognizes that when areas become urbanized to the extent that they need the full range of community services, priorities are required to be established regarding the type and levels of services that the residents of an urban community need and desire; that community service priorities be established by weighing the total community service needs against the total financial resources available for

¹ The Cortese-Knox Act repealed the Knox-Nisbet Act (former sections 54773-54992 (West 1983)). See description of Knox-Nisbet Act in Amicus Brief of the United States, p. 3 n.4. The current provisions regarding LAFCO's functions in incorporation of cities, annexation of territory to existing local agencies and formation of special districts are contained in the Cortese-Knox Act.

securing community services; and that those community service priorities are required to reflect local circumstances, conditions, and limited financial resources. The Legislature finds and declares that a single governmental agency, rather than several limited purpose agencies, is in many cases better able to assess and be accountable for community service needs and financial resources and, therefore, is the best mechanism for establishing community service priorities.

TITLE 7. PLANNING AND LAND USE

Division 1. Planning and Zoning. §§ 65000-65993.

Chapter 3. Local Planning.

Article 5. Authority for and Scope of General Plans.
§§ 65300-65307.

§ 65302. Elements required to be included in plan

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

(a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall identify areas covered by the plan which are subject to flooding and shall be reviewed annually with respect to those areas. . . .

(b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land use element of the plan.

(c) A housing element as provided in Article 10.6 (commencing with Section 65580).

(d) A conservation element for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources. . . .

(e) An open-space element as provided in Article 10.5 (commencing with Section 65560).

(g) A safety element for the protection of the community from any unreasonable risks associated with the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami, seiche, and dam failure; slope instability leading to mudslides and landslides; subsidence and other geologic hazards known to the legislative body; flooding; and wild land and urban fires. The safety element shall include mapping of known seismic and other geologic hazards. It shall also address evacuation routes, peakload water supply requirements, and minimum road widths and clearances around structures, as those items relate to identified fire and geologic hazards.

Article 7. Administration of General Plan. §§ 65400-65403.

§ 65400. Duties of agency

After the legislative body has adopted all or part of a general plan, the planning agency shall do both of the following:

(a) Investigate and make recommendations to the legislative body regarding reasonable and practical means

for implementing the general plan or element of the general plan, so that it will serve as an effective guide for orderly growth and development, preservation and conservation of open-space land and natural resources, and, the efficient expenditure of public funds relating to the subjects addressed in the general plan.

(b) Provide an annual report to the legislative body on the status of the plan and progress in its implementation.

§ 65402. Acquisition or disposition of property; construction of buildings; requirements before action

(a) If a general plan or part thereof has been adopted, no real property shall be acquired by dedication or otherwise for street, square, park or other public purposes, and no real property shall be disposed of, no street shall be vacated or abandoned, and no public building or structure shall be constructed or authorized, if the adopted general plan or part thereof applies thereto, until the location, purpose and extent of such acquisition or disposition, such street vacation or abandonment, or such public building or structure have been submitted to and reported upon by the planning agency as to conformity with said adopted general plan or part thereof. . . .

Chapter 4. Zoning Regulations.

Article 2. Adoption of Regulations. §§ 65850-65863.9.

§ 65850. Scope of power to regulate by ordinance

The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

(a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

§ 65851. Division of city or county into zones

For such purposes the legislative body may divide a county, a city, or portions thereof, into zones of the number, shape and area it deems best suited to carry out the purpose of this chapter.

§ 65852. Uniformity of zoning regulations

All such regulations shall be uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones.

Article 3. Administration. §§ 65900-65909.5.

§ 65901. Hearings on conditional use and other permits; powers of board; rules and procedures; variances

(a) The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance. . . .

§ 65906. Variances from zoning ordinances

Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges incon-

sistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits.

Division 2. Subdivisions (the "Subdivision Map Act"). §§ 66410-66499.37.

Chapter 1. General Provisions and Definitions.

Article 1. General Provisions. §§ 66410-66413.

§ 66411. Local control of subdivision design and improvement; short term leases

Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance regulate and control subdivisions for which this division requires a tentative and final or parcel map. * * *

§ 66412. Application of division; exclusions

This division shall be inapplicable to:

(a) The financing or leasing of apartments, offices, stores or similar space within apartment buildings, industrial buildings, commercial buildings, mobilehome parks, or trailer parks.

§ 66412.1. Inapplicability of division to financing or leasing of parcel of land for construction of or of existing separate commercial or industrial buildings

This division shall also be inapplicable to:

(a) The financing or leasing of any parcel of land, or any portion thereof, in conjunction with the construction

of commercial or industrial buildings on a single parcel, unless the project is not subject to review under other local agency ordinances regulating design and improvement.

(b) The financing or leasing of existing separate commercial or industrial buildings on a single parcel.

Article 2. Definitions. §§ 66414-66424.6.

§ 66418. Design

"Design" means: (1) street alignments, grades and widths; (2) drainage and sanitary facilities and utilities, including alignments and grades thereof; (3) location and size of all required easements and rights-of-way; (4) fire roads and firebreaks; (5) lot size and configuration; (6) traffic access; (7) grading; (8) land to be dedicated for park or recreational purposes; and (9) such other specific physical requirements in the plan and configuration of the entire subdivision as may be necessary to ensure consistency with, or implementation of, the general plan or any applicable specific plan.

§ 66419. Improvement

(a) "Improvement" refers to any street work and utilities to be installed, or agreed to be installed, by the subdivider on the land to be used for public or private streets, highways, ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof.

(b) "Improvement" also refers to any other specific improvements or types of improvements, the installation of which, either by the subdivider, by public agencies, by private utilities, by any other entity approved by the local agency, or by a combination thereof, is necessary to ensure consistency with, or implementation of, the general plan or any applicable specific plan.

§ 66424. Subdivision

"Subdivision" means the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future except for leases of agricultural land for agricultural purposes. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way. . . . As used in this section, "agricultural purposes" means the cultivation of food or fiber or the grazing or pasturing of livestock.

§ 66424.5. Tentative map

"Tentative map" refers to a map made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it and need not be based upon an accurate or detailed final survey of the property.

Chapter 2. Maps.

Article 1. General Provisions. §§ 66425-66431.

§ 66426. Necessity of tentative and final maps

A tentative and final map shall be required for all subdivisions creating five or more parcels, five or more condominiums as defined in Section 783 of the Civil Code, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except where:

(a) The land before division contains less than five acres, each parcel created by the division abuts upon a maintained public street or highway and no dedications or improvements are required by the legislative body, or

(b) Each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway, or

(c) The land consists of a parcel or parcels of land having approved access to a public street or highway which comprises part of a tract of land zoned for industrial or commercial development, and which has the approval of the governing body as to street alignments and widths, or

(d) Each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter of a quarter section.

A parcel map shall be required for those subdivisions described in subdivisions (a), (b), (c), and (d).

Chapter 3. Procedure.

Article 2. Tentative Maps. §§ 66452-66452.10.

§ 66452.3. Report or recommendation

Any report or recommendation on a tentative map by the staff of the local agency to the advisory agency or legislative body shall be in writing and a copy thereof served on the subdivider

§ 66452.4. Approval by failure to act

If no action is taken upon a tentative map by an advisory agency which is authorized by local ordinance to approve, conditionally approve or disapprove the tentative map or by the legislative body within the time limits specified in this chapter or any authorized extension thereof, the tentative map as filed, shall be deemed to be approved, insofar as it complies with other applicable requirements of this division and local ordinance, and it shall be the duty of the clerk of the legislative body to certify such approval.

§ 66452.5. Appeal from act of advisory agency

(a) The subdivider . . . may appeal from any action of the advisory agency with respect to a tentative map to . . . the legislative body.

Any such appeal shall be filed with the . . . clerk of the legislative body within 10 days after the action of the advisory agency from which the appeal is being taken.

Upon the filing of an appeal, the . . . legislative body shall set the matter for hearing. Such hearing shall be held within 30 days after the date of filing the appeal. Within 10 days following the conclusion of the hearing, the . . . legislative body shall render its decision on the appeal.

Article 3. Review of Tentative Maps by Other Agencies. §§ 66453-66455.7.

§ 66453. Local agency recommendations concerning proposed subdivisions in adjoining territory

A local agency may make recommendations concerning proposed subdivisions in any adjoining city or in any adjoining unincorporated territory provided such subdivisions are within three miles of the exterior boundary of such local agency. . . .

Any local agency . . . shall make its recommendation to the local agency having jurisdiction of the subdivision within 15 days after receipt of such tentative map. The recommendations shall be taken into consideration by the local agency having jurisdiction before action is taken upon the tentative map.

Chapter 4. Requirements.

Article 1. General. §§ 66473-66474.8.

§ 66473. Noncompliance with statute or local ordinance; waiver of technical or inadvertent error

A local agency shall disapprove a map for failure to meet or perform any of the requirements or conditions

imposed by this division or local ordinance enacted pursuant thereto; provided that a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map; and provided further that such disapproval shall be accompanied by a finding identifying the requirements or conditions which have not been met or performed. . . .

§ 66473.5. Consistency with general and specific plans

No local agency shall approve a tentative map, or a parcel map for which a tentative map was not required, unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan required by Article 5 (commencing with Section 65300) of Chapter 3 of Division 1, or any specific plan adopted pursuant to Article 8 (commencing with Section 65450) of Chapter 3 of Division 1.

A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan.

§ 66474. Findings justifying disapproval

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.

(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

(c) That the site is not physically suitable for the type of development.

(d) That the site is not physically suitable for the proposed density of development.

(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

(f) That the design of the subdivision or type of improvements is likely to cause serious public health problems.

§ 66474.01. Tentative map or parcel map; approval

Notwithstanding subdivision (e) of Section 66474, a local government may approve a tentative map, or a parcel map for which a tentative map was not required, if an environmental impact report was prepared with respect to the project and a finding was made pursuant to subdivision (c) of Section 21081 of the Public Resources Code that specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report.

Chapter 7. Enforcement and Judicial Review.

Article 3. Judicial Review. § 66499.37.

§ 66499.37. Time for judicial review; calendar precedence

Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of sum-

mons effected within 90 days after the date of such decision. . . . Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.

CALIFORNIA CODE OF CIVIL PROCEDURE § 1094.5.

Writ Issued—Purposes to Inquire Into Validity of Final Administrative Order—Costs.

[Printed in Jurisdictional Statement—Appendix D-1]

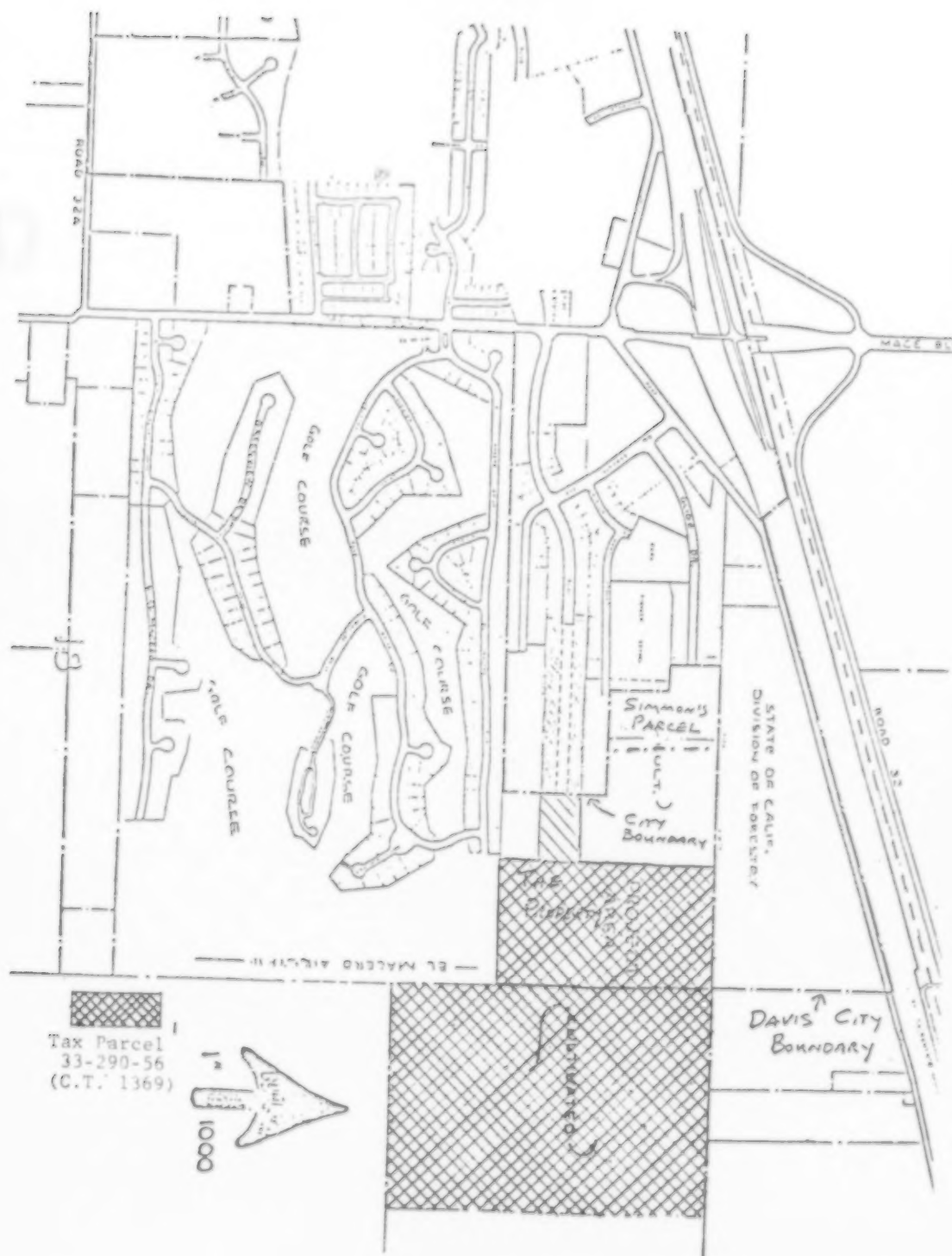
APPENDIX C

DOCUMENTS JUDICIALLY NOTICED
BY CALIFORNIA COURTS AND CITED BY APPELLEES

Document	Location in Record Where Document Was Judicially Noticed	Location in Record	J.A.
1. Board's Determination and Findings (Ex. C to Complaint)	R.T. 112	C.T. 842-54	J.A. 71-80
2. County Agreement 75-97	R.T. 113	C.T. 1106-17	
3. Tax Parcel Records of County Assessor	R.T. 118	C.T. 1364-86	
4. Yolo County Zoning Ordinances	R.T. 134-35	Supp. C.T. 1-133	J.A. 137-56
5. Yolo County General Plan	R.T. 134-35	Supp. C.T. 279-331; 517-19	
6. City of Davis General Plan	R.T. 121	Exhibit 4	
7. Appellant's Mandate Action No. 36657	C.T. 1653	C.T. 583-602	J.A. 21-33
8. April 19, 1977 Letter from County Planning Director	R.T. 117	C.T. 1362	J.A. 10
9. Aerial Photograph	R.T. 119	C.T. 1102	J.A. 7

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APPENDIX D



BEST AVAILABLE COPY



Yellow	44 acre area of Map No. 2462
Red	Davis City Limits (Supp. C.T. 396)
Blue	El Macero C.S.A. (C.T. 1117)
Green	U.C. Davis Campus (Supp. C.T. 396)

REPLY

BRIEF

21

Supreme Court, U.S.

FILED

MAR 18 1986

JOSEPH F. SPANIOL, JR.
CLERK

No. 84-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, a partnership,

Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,

Appellees.

On Appeal From the Court of Appeal of California

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HIPW

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No. 84-2015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal From the Court of Appeal of California

REPLY BRIEF FOR APPELLANT
MACDONALD, SOMMER & FRATES

STATEMENT OF THE CASE

**A. Determining The Proper Sources Of The Facts For
Consideration Of The Issues Raised By This Appeal.**

As this Court has often noted, takings cases must be determined on their particular facts.¹ The briefs disclose a sharp dispute between the parties as to the sources from which the Court must ascertain the facts—in a case where Owner was denied a trial of the factual issues.

Note: In quoted material footnotes are omitted and emphasis is ours unless otherwise noted. All terms have the meaning given in our Opening Brief and we cite to the Record by use of the same references.

¹ Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2878 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

Davis and Yolo County contend that the Court must disregard the allegations of the Complaint that they characterize as "conclusory" or that conflict with the findings of the Yolo County Board of Supervisors (the "Board"). They argue that facts stated in documents judicially noticed must be taken as true; that the Board's findings preclude contrary evidence by virtue of *res judicata* or collateral estoppel effect, and/or that California has provided an exclusive remedy for challenging the findings, *i.e.* by proceeding in mandate.

We explain below why these contentions are specious.² But in considering the details of the argument concerning the effect to be given to the Board's findings (*i.e.*, are they evidence that must be weighed by a trier of fact against all other evidence or are they endowed by law with a potency that precludes any contrary evidence), the Court should note the central premise of Davis' and Yolo County's argument. It is this: *A public agency, engaged in land use regulation, is entitled to insulate itself from any claim that it has violated constitutional rights by making "findings of fact" that it has not done so.* These findings foreclose any trial of the factual issues. It should come as no surprise that the legal "authority" Appellees muster in support of so remarkable a proposition cannot withstand scrutiny.

B. The Facts Before The Court For Purposes Of This Appeal.

1. Owner Was Denied A Trial.

The *central overriding fact* for purposes of this Appeal is that the Complaint was dismissed on the grounds that it was insufficient to state a factual basis upon which Owner may be entitled to relief under the United States Constitution.

2. Davis and Yolo County Have Restricted The Property To Agricultural Use.

Yolo County and Davis have acted together to impose Davis' "Agricultural Preserve" designation upon the Property. JA 49 ¶ 21(a). That designation restricts the Property to

² See pages 5-10 *infra*.

agricultural use.³ JA 49-50 ¶ 21. All access and service sufficient to support development of the Property for residential use are physically and legally available but for Davis' decision to withhold them. JA 45 ¶ 12; 49 ¶ 20.⁴

3. Restriction Of The Property To Farming Condemns Owner To Hold The Property At A Complete Loss.

The Property cannot be farmed to yield a gross return sufficient to cover the cost of farming and the bare cost of ownership. JA 45 ¶ 11; 51-52 ¶¶ 25-26. See also CTA Supp III 836. The maximum income to be derived from farming is insufficient to cover fixed and variable costs *without regard to land rent or return on investment.* *Id.* Thus, restricted to farming use, the Property has a zero or negative economic value and is deprived of all economic beneficial use. JA 61 ¶ 35. At

³ The relevant Yolo County General Plan Policy Statement is:

"All urban development within the sphere of influence of the City of Davis should take place *only after annexation to that city of the property involved* This policy will enable the City to *maintain control over development* and avoid City-County conflict. The policy primarily would function to assure Davis' self determination of its future. Support for this policy is found in the following: . . . maintenance of the agricultural economy of the county requires a minimum of urbanization, for the *preservation of rich Yolo farm resources and the amenities of open space* is, in the long run, the highest and best use of this land." CTA Supp. 523.

The Property falls within the area to which this policy statement applies. CTA Supp. II 525.

In describing the policy, the General Plan states: "The declaration and adoption of the basic policy statement . . . which allows urban development to occur only within . . . Davis is *fundamental* to the proposed changes to the County's Davis Area General Plan. With the adoption of this general policy and using the City of Davis' land use element as a developmental guide . . . ". CTA Supp. II 528. See also CTA Supp III 819 (Davis claims that its plan is paramount as a matter of law). During most of the relevant period, Davis had a moratorium in place prohibiting annexation. CTA Supp III 776.

⁴ Yolo County cannot lawfully approve any development permit or take any action to allow development to occur on the Property unless it finds that the permit or development is consistent with the General Plan. *Camp v. Board of Supervisors*, 123 Cal. App. 3d 134, 176 Cal. Rptr. 620 (1981); *Friends Of "B" Street v. Hayward*, 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980); *Save El Toro Association v. Days*, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977). Given the policy statements quoted in fn. 3, the required finding of consistency *could not be made for any use other than agriculture or open space.* See *e.g.* Cal. Gov't Code §§ 65300.5, 65454, 65567; 65860; 66474 (Deering Supp. 1985).

the time the restrictions were imposed by Yolo County at Davis' urging, Yolo County knew that its restriction would have that effect upon the Property. JA 51 ¶ 24.

4. **The Board's Denial Of Owner's Subdivision Application Was A Final Decision To Deny All Use Inconsistent With Davis' Agricultural Preserve Restrictions. Application For Any Other Use Would Be Futile.**

The general plan policy quoted in note 3 renders Yolo County legally unable to grant permission for use of the Property for any purpose other than agriculture or open space. No extension of public service can occur in the face of that policy.⁵ Davis and Yolo County have both declared their intent to apply and uphold that policy. JA 51 ¶ 24.

Under these circumstances, any application by Owner for any use of the Property inconsistent with Davis' Agricultural Preserve designation would be futile. *Yolo County and Davis have unequivocally stated that any such application, regardless of its form, would be denied.* JA 49-52 ¶¶ 21-26. See also JA 123 ¶ 2 and 126 n. 1.

5. **The Regulation Imposed Upon The Property Is Not Necessarily Temporary.**

The allegations of the Complaint show that the restriction has been imposed in a manner which makes its duration indefinite and which renders any application for a change in use futile. JA 58 ¶ 26. The restriction has in fact endured since at least June 14, 1977 when the Board adopted its findings and made its decision. JA 3.⁶

⁵ See note 4. In the proceedings on Owner's proposal, Davis claimed that Yolo County lacked a complete general plan and hence lacked the legal ability to approve anything. CTA Supp III 839.

⁶ It is possible that Yolo County and Davis might not have the same intent if it comes at a price. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J. dissenting) (cited herein as "*San Diego dissent*"), outlines a mechanism for minimizing that price in a manner analogous to abandonment of an eminent domain proceeding. *Id.* at 658-59.

ARGUMENT

- A. **For Purposes Of This Appeal, The Facts Must Be Taken From The Complaint. The Board's Findings Are Not Entitled To Preclusive Effect. Appellees Have Misstated The Law Applicable To Matter Judicially Noticed And The Law Of California Pleading.**

1. **The Board's Findings Are Not Res Judicata Nor Do They Collaterally Estop Retrial Of The Fact Issues The Board Supposedly Found.**

Appellees claim that the Board's findings are res judicata or collaterally estop retrial of issues addressed in the findings. Appellee B. pp 19-22. They contend that the Board's judgment precludes a trial of the issues it has decided. They cite *Allen v. McCurry*, 449 U.S. 90 (1980) and *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), in support of this proposition.

The doctrines of *res judicata* and collateral estoppel concern the extent to which matter *finally determined* in one proceeding should be binding on parties *to another proceeding* which concerns the same issue. The doctrines do not apply *at all* to this proceeding unless one assumes that the determination by the Board is a *final* adjudication and that the case now pending before this Court must be treated as a *collateral attack* rather than a direct appeal.

One can reach that end only by one of two possible routes: either (a) mandate is the *exclusive procedure* provided by California for challenging the findings of the Board, *and* (b) *this Court is required to honor that exclusivity*; or (c) mandate provides a vehicle for challenging the findings which *must* be pursued and *exhausted* before the findings may be challenged in an action such as this. *Appellees' case fails all of these tests.*

- (a) **Mandate Is Not The Exclusive Remedy Under California Law.**

In *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 868, n.4, 705 P.2d 866, 869, 218 Cal. Rptr. 293, 296 (1985) the court stated:

The instant case does not involve allegations of unreasonable zoning or regulatory permit activity—the remedy for which, of course, is not an inverse condemnation suit for damages, but *declaratory relief* or *mandamus*.

To the same effect, see *Agins v. City of Tiburon*, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).⁷

(b) Even If Mandate Were The Exclusive Remedy In California For Challenging The Board's Findings, This Court Would Not Be Required To Honor That Exclusivity.

(i) No Statute Or Judicial Precedent Grants Preclusive Effect To Unreviewed Quasi-Judicial, State Administrative Proceedings Unless The State Administrative Proceedings Acknowledge The Basis For The Claim And Provide Fair Procedures.

The argument that findings made in an unreviewed state administrative proceeding have preclusive effect must be based either upon a controlling statute or a rule of comity articulated by this Court. The only statute remotely relevant is 28 U.S.C. § 1738. That statute requires this Court to give preclusive effect to *state court judgments which have become final*. See, e.g., *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

Principles of judicial comity and the desire to conserve judicial resources can justify an extension of preclusive effect beyond the express mandate of 28 U.S.C. § 1738. *McDonald v. City of West Branch*, 104 S.Ct. 1799, 1802 (1984). In *McDonald*, however, this Court expressly refused to grant preclusive effect, in a separate federal action brought under 42 U.S.C. § 1983, to an unreviewed state administrative proceeding. The Court gave clear notice of its intent to reach the

⁷ In California, declaratory relief is had after full trial on the merits (Cal. Civ. Proc. Code §§ 1060 *et seq.* (Deering Supp. 1985)). In such a proceeding, the Board's findings would be evidence, entitled to no more respect than any other evidence.

McDonald result in *Kremer*, 456 U.S. at 470, n. 7.⁸ Appellees cite neither *McDonald* nor *Kremer*.

Where state proceedings are not entitled to preclusive effect by operation of 28 U.S.C. § 1738, the decision whether or not to grant them such effect turns upon the nature of those proceedings and the type of relief available in them.

Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. *Kremer*, 456 U.S. at 481, quoting from *Montana v. United States*, 440 U.S. 147, 164, n. 11 (1979).

Even in a case arguably controlled by 28 U.S.C. § 1738 (which this is not), *res judicata* and collateral estoppel do not apply.

Where state law [does] . . . not provide fair procedures for the litigation of constitutional claims, or where a state court [fails] to even acknowledge the existence of the constitutional principle upon which a litigant [bases] . . . his claim Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. *Allen v. McCurry*, 449 U.S. 90, 101 (1980).

(ii) California Mandate Does Not Meet The Standards Of Fair Procedure Established By *Kremer* And *Allen*.

California mandate procedure fails pervasively to meet the standards of fairness required to entitle those procedures to preclusive effect.

First, California absolutely denies "the existence of the constitutional principle" upon which Owner bases its claim. There is no right to compensation in California on any theory or in any form of action.⁹

⁸ See also, *Elliott v. Univ. of Tenn.*, 766 F. 2d 982 (6th Cir. 1985), cert. granted, 54 U.S.L.W. 3374 (1985); *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550 (6th Cir. 1983), affirmed *sub. nom.* *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985).

⁹ *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) *aff'd on other grounds*, 447 U.S. 255 (1980) (the California Supreme Court case being referred to herein as "*Agins I*" and the U.S. Supreme Court case as "*Agins II*"); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 39 Cal. 3d 862, 868 n.4, 705 P.2d 866, 869, 218 Cal. Rptr. 293, 296 (1985).

Second, if the Board's findings control, *then for all practical purposes, the defendant is the judge*. Yolo County can defend against the claim that it has violated constitutional rights by finding that it has not done so.¹⁰

Although California procedure allows limited review of the Board's decision,¹¹ the procedure does not meet minimal standards of fairness.¹²

¹⁰ An impartial judge is a *sine qua non* of due process. A judge with a pecuniary interest (*Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)) or who has a dual role of judge and prosecutor (*In re Murchison*, 349 U.S. 133 (1955)) is not impartial. Bias is presumed where there is a pecuniary interest. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

¹¹ Cal. Civ. Proc. Code ("CCP") § 1094.5 (Deering Supp. 1985) controls the proceedings for administrative review of quasi-judicial administrative proceedings where specific applications are considered. *Horn v. County of Ventura*, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); *Topanga Assoc. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). Factual determinations of the administrative agency will be sustained unless the Court determines "that the findings are not supported by substantial evidence in the light of the whole record..." except in those cases where "the Court is authorized by law to exercise its independent judgment on the evidence...". CCP § 1094.5. Courts are authorized by law to exercise independent judgment, *i.e.*, reweigh the evidence only where the administrative decision affects a "fundamental vested right." *Strumsky v. San Diego County Employees Retirement Assoc.*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974); *Transcentury Properties, Inc. v. State of California*, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1974). A property owner has no right in California to a use not already established. See Brief of *Amicus Curiae* State of California *et al* at 5; *Pescosolido v. Smith*, 142 Cal. App. 3d 964, 191 Cal. Rptr. 415 (1983); *Del Mar v. Coastal Comm'n.*, 152 Cal. App. 3d 49, 199 Cal. Rptr. 225 (1984); *Nat'l City Business Assoc. v. Nat'l City*, 146 Cal. App. 3d 1060, 194 Cal. Rptr. 707 (1983). Therefore, the substantial evidence test applies to a case such as this.

An administrative decision, reviewed under the substantial evidence test, is sustained if the record contains *any* evidence to support it regardless of the weight of the contrary evidence. *Northern Inyo Hosp. v. Fair Employment Practices Comm'n.*, 38 Cal. App. 3d 14, 112 Cal. Rptr. 872 (1974). In California land use proceedings, the rules of evidence do not apply (Cal. Gov't Code § 65010 (Deering Supp. 1986)) and the decision below may rest on nothing more than the opinion (without foundation) of the planner for the agency whose decision is under attack. *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 161 Cal. Rptr. 260 (1980).

¹² Compare the administrative procedures at issue in *Elliott v. Univ. of Tenn.*, 766 F.2d 982, 985 (6th Cir. 1985), cert. granted 54 U.S.L.W. 3374 (1985) with those at issue here. The proceedings in *Elliott* were had before an administrative judge who could be disqualified for bias, prejudice or interest. The parties are entitled to examine and cross-examine witnesses and

(footnote continued)

(iii) The Authorities Cited By Appellees Do Not Support Their Claim Of Preclusive Effect For The Board's Findings.

The cases cited by Appellees do not support their contentions. *United States v. Utah Construction & Mining*, 384 U.S. 394 (1966), granted preclusive effect to a decision by a federal administrator whose decisions derived preclusive effect from both contract and directly applicable federal statute.

Allen v. McCurry, 449 U.S. 90 (1980) is controlled by 28 U.S.C. § 1738. The question before the Court was whether or not the legislative purpose behind 42 U.S.C. § 1983 was sufficient to override the *express* applicability of 28 U.S.C. § 1738 to a final *prior state court judgment*. The Court held that 28 U.S.C. § 1738 controlled. It emphasized, however, the importance of inquiring into the fairness of state court procedures for which preclusive effect is claimed.

We do not mean to over-dignify the argument by going to such lengths to refute it; and we would not do so but for Appellees' emphasis upon it to alter the "facts" before the Court. But the argument that the findings of an agency whose decision is under direct—rather than collateral—review should be entitled to preclusive effect has no support whatever in law or logic. By advancing it here, Appellees demonstrate, we think, the desperate lengths to which they are willing to go to avoid putting the Board's finding to the test of trial.

(iv) Owner Was Not Required To Pursue Its Mandate Action Prior To Bringing This Case.

In *Patsy v. Board of Regents*, 457 U.S. 496 (1982) this Court reiterated that a party need not exhaust state judicial remedies prior to asserting a claim under 42 U.S.C. § 1983. See also *Monroe v. Pape*, 365 U.S. 167 (1961); *McNeese v. Board of Education*, 373 U.S. 668 (1963).¹³

(footnote continued from previous page)

the civil rules of evidence generally apply. The court in *Elliott* nonetheless refused to give preclusive effect to the administrative proceeding in a separate federal action. California does not allow the question of bias or prejudice even to be inquired into, (*see, e.g.*, *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975)), in proceedings to which the rules of evidence do not apply at all. Cal. Gov't Code § 65010 (Deering Supp. 1986).

¹³ See also *Allen v. McCurry*, 449 U.S. at 101.

These and other authorities establish that Owner has no obligation to test the Board's findings in the California mandate action as a precondition to filing its claim either directly under the Fifth Amendment or under 42 U.S.C. § 1983.¹⁴ Square holdings of this Court eliminate the exhaustion requirement as to the latter and the applied rationale of the exhaustion doctrine eliminate the requirement as to the former.

2. Appellees Have Misstated The Effect Of Taking Judicial Notice. Judicial Notice of the Board's Findings Does Not Admit The Truth Of Them.

In *Cruz v. Los Angeles County*, 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661, 663 (1985), the court held:

... [T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom. . . . (citations) Such being the case, and because "A demurrer is simply not the appropriate procedure for determining the truth of disputed facts," (citing *Ramsden v. Western Union*, 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426, 429 (1977)), *judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.*

See also, *Beckley v. Reclamation Board*, 205 Cal. App. 2d 734, 741-42, 23 Cal. Rptr. 428, 433 (1962).¹⁵

¹⁴ As we explain at pages 16-17 *infra*, the pending mandate action has no relevance to these proceedings for a variety of reasons including the fact that it cannot provide constitutionally adequate relief because California does not "acknowledge the existence of the constitutional principle on which . . ." Owner bases its claim. *Allen v. McCurry*, 449 U.S. at 101.

¹⁵ This rule has been applied to reject judicial notice of the truth of: statements made in congressional hearings, *Love v. Wolf*, 226 Cal. App. 2d 378, 403, 38 Cal. Rptr. 183, 198 (1964); statements in an arrest report, *Ramsden v. Western Union*, 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426, 429 (1977); statements in defendant's juvenile file, *People v. Long*, 7 Cal.

(footnote continued)

Where the Complaint contradicts the Board's findings, the Complaint controls.

3. Rules of California Pleading Do Not Require The Court To Read Out Of The Complaint So-Called "Conclusory" Allegations Or Allegations Inconsistent With The Board's Findings.

(a) The Complaint Sufficiently Pleads The Facts To Apprise Appellees Of Owner's Claim.

Appellees state that the Court must reject as "not well pleaded" allegations which Appellees characterize as "conclusory" or "conclusions of law."¹⁶ The law imposes no such requirement.

In *Estate of Bixler*, 194 Cal. 585, 589, 229 P. 704, 706 (1924), the California Supreme Court stated:

The lines of demarkation [sic] between conclusions of fact, conclusions of law, and an admixture of the two, are not clearly defined. The allegation of an ultimate fact as distinguished from an evidentiary fact usually, if not always, involves one or more conclusions.¹⁷

(footnote continued from previous page)

App. 3d 586, 591, 86 Cal. Rptr. 590, 592 (1970); in testimony before a grand jury, *Williams v. Hartford Ins. Co.*, 147 Cal. App. 3d 893, 899, 195 Cal. Rptr. 448, 452 (1983); and statements in a magistrate's findings, *People v. Tolbert*, 222 Cal. Rptr. 313 (1986). A court may not consider the administrative record in considering a demurrer to a mandate petition. *Kleiner v. Garrison*, 82 Cal. App. 2d 442, 187 P. 2d 57 (1947).

¹⁶ In many cases, the critical allegations are not properly so characterized. For example, the conclusion that the restrictions imposed by Davis and Yolo County deprive the Property of all economic beneficial use of the land is not "conclusory" in any sense, but is a classic pleading of "ultimate fact" in the best tradition of the Field Code. See quotation from pleading manual of David Dudley Field in *Green v. Palmer*, 15 Cal. 411, 414 (1860). In any case, the statement does not stand alone. It summarizes other well-pleaded facts. JA 45-46 ¶ 12; 49-50 ¶ 21; 52-58 ¶ 26. Appellees also characterize as "conclusory" Owner's allegations concerning the futility of seeking a zone change, variance or other administrative relief. Appellee B. pp 23-24. This is patently absurd. The Complaint is full of factual allegations demonstrating Davis' and Yolo County's resolve to prohibit all non-agricultural uses of the Property. JA 45 ¶ 12; 47 ¶ 17; 49-50 ¶ 21; 51-58 ¶¶ 23-26.

¹⁷ See also *Krug v. Meeham*, 109 Cal. App. 2d 274, 277, 240 P. 2d 732, 734 (1952) (Complaint read to include all facts fairly inferable).

The question turns upon whether the pleading as a whole apprises the adversary of the factual basis of the claim. See *Lewis v. Fahn*, 113 Cal. App. 2d 95, 100, 247 P.2d 831, 834-35 (1952).¹⁸

In this case, Appellees make no claim that they are ignorant of Owner's contentions. Indeed, after four hearings on the complaints Owner filed, they could hardly do so. What they seek to do is have the Court accept *their version of the facts as incontrovertible without a trial*. Such a result is as inappropriate in California as it would be in federal court on a Rule 12(b)(6) motion.¹⁹

(b) California Law Does Not Require The Court To Disregard Contentions Contrary To The Board's Findings Simply Because The Board's Findings Are In A Writing.

Appellees contend that California pleading practice requires the Court to disregard allegations in the body of the Complaint which are contrary to documents incorporated by reference in it. They have totally missed the premise of the cases.

In *Hollister Park Investment Co. v. Goleta County Water District*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978), a water district adopted an interim moratorium on new connections. A property owner sued, contending that the water district owed him a reasonable level of service as a matter of constitutional right. The court rejected that argument *as a matter of law*. In

¹⁸ See also, *Horton v. Horton*, 115 Cal. App. 2d 360, 367, 252 P.2d 397, 401-02 (1953) ["The office of pleadings is to outline the issues so that the parties may know what is involved in the litigation"]; *Leet v. Union Pacific Railway Co.*, 25 Cal. 2d 605, 619, 155 P.2d 42, 49 (1944) ["The essence of the matter is fairness in pleading to give the defendant such notice by the complaint that he may prepare his case"]. The particularity of facts to be pleaded depends upon the extent to which the defendant needs detailed information. *Semole v. SanSoucie*, 28 Cal. App. 3d 714, 104 Cal. Rptr. 897 (1972).

¹⁹ See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

short, the complaint in *Hollister Park* raised no material factual issues in conflict with the writings judicially noticed.²⁰

Fundin v. Chicago Pneumatic Tool Co., 152 Cal. App. 3d 951, 955, 199 Cal. Rptr. 789, 792-93 (1984) is cited by Appellees for the proposition that: "any allegations in the complaint which are inconsistent with facts set out in an unambiguous written instrument, incorporated by reference, may be stricken (citations)." Brief for Appellees at 3. *Fundin* is a contract case where the writing in question had preclusive effect by operation of the parol evidence rule. How the parol evidence rule relates to this case, Appellees do not say.

B. This Case Is Ripe For Decision.

1. Owner Has No Untested Avenues It Is Required To Pursue In Order To Demonstrate The Manner In Which The Restrictions Will Be Applied To It In This Case.

Appellees contend that the Court cannot determine how the restrictions will be applied to the Property because Owner had available to it four avenues of relief. These avenues were (i) application for a "use variance" (a variance allowing a use different than that allowed by the applicable zoning and general plan); (ii) application for a "hardship variance" (a variance allowing Owner relief from technical restrictions, e.g., building set-backs, that impose upon Owner a unique hardship due to the peculiar physical circumstances of the Property); (iii) application for a different subdivision proposal (lower density, different design, etc.); and/or (iv) application for refund of sewer assessments paid. Appellees contend that the

²⁰ The property owner also sought to prove that the ordinance was intended to stop growth rather than conserve water. The court rejected that argument *as a matter of law* as well, relying upon *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). Citation of *Hollister Park* by Appellees is a classic example of bootstrapping. The Court concluded: "Damage to the land owner caused by the moratorium is not compensable. Its [the owner's] remedy if the board of the district does not carry out the obligation imposed by the statute lies in a petition for mandate. (citations)" 82 Cal. App. 3d at 294, 147 Cal. Rptr. at 93. If that conclusion is wrong, as Owner asserts here, then *Hollister Park* was wrongly decided below for the same reason that this case was.

existence of these untested avenues renders this case unripe for decision under the holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108 (1985) ("*Hamilton Bank*").

Owner's first response is that *these are trial issues. If Appellee can prove that the avenues are available, then it has a clear defense to this action and nothing to fear from a trial.*

In fact, none of these avenues are available to Owner. Use variances are illegal in California.²¹ There is no precedent or logic to suggest that a hardship variance would be applicable to facts such as these; the Complaint alleges that Yolo County would deny any application for any use inconsistent with Davis' Agricultural Preserve designation;²² and the right to recover assessments (to the extent that the right exists and was not barred by the statute of limitations *before* Owner found out that it would be denied residential use) does not allow recovery for the loss inflicted by the restriction and is, therefore, a constitutionally inadequate remedy.²³

In *Hamilton Bank*, the Court's ripeness conclusion was determined from a trial record:

The Commission's refusal to approve the preliminary plat . . . prevents respondent from developing its subdivision without obtaining the necessary variances, *but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances.* 105 S. Ct. at 3120-21.

The Court found that variances were available from both the Commission and the Board of Zoning Appeals and other remedies were available under Tennessee law. *Id.* at 3117-18.

²¹ A point Appellees concede. Brief for Appellees at 29. See also note 22 *infra*, Cal. Gov't Code § 65906 (Deering 1979), and *Topanga Ass'n For A Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 n.5, 519 n.18, 522 P.2d 12, 15, 20, 113 Cal. Rptr. 836, 838-39, 844 (1974).

²² All uses inconsistent with the general plan policy quoted in note 3 *supra* would be illegal in California. See authorities cited at note 4. This prohibition extends to public service and road extensions (*Friends of "B" Street v. City of Hayward*, *supra*) as well as to all permit type actions. *Neighborhood Action Group v. Calaveras County*, 156 Cal. App. 3d 1176, 203 Cal. Rptr. 402 (1984).

²³ Constitutionally inadequate remedies need not be exhausted. *Allen v. McCurry*, 449 U.S. 90 (1980).

The doctrine of *Hamilton Bank* does not apply where variances are not legally available, applications for relief would be futile and/or where the only relief actually available is constitutionally inadequate.²⁴ Although the authorities upon which Owner relies are drawn from cases dealing with the requirement of exhaustion of administrative remedies, that requirement is directly analogous. (See *Hamilton Bank*, 205 S. Ct. at 3120).

A party is not required to pursue remedies where the exercise would be futile. In *Ogo Associates v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974), the court disposed of a contention that the property owner should have applied for a variance²⁵ by stating:

[H]ere appellants can positively state that the city council would not have granted them a variance. The evidence is overwhelming that the city council rezoned the . . . area because appellants planned to build their project there; it is inconceivable the city council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. . . . To require appellants to apply to the city council for a variance on behalf of this project would be to require them to pump oil from a dry hole. 37 Cal. App. 3d at 834, 112 Cal. Rptr. at 763.

²⁴ Appellees contend that Owner could use the Property for a variety of purposes without going through the subdivision process. Since Appellees could not grant any approval for use inconsistent with the general plan policy quoted in n. 3, *supra*, the argument is beside the point, but it is wrong in any case. Cal. Gov't Code § 66428 (Deering Supp. 1985) generally requires parcel maps for any land divisions. Parcel maps are subject to the same approval criteria as tentative subdivision maps. Cal. Gov't Code § 66474 (Deering Supp. 1985). Owner will prove at trial that it could not use the Property without dividing it at a minimum for purposes of dedicating utility rights of way, road rights of way, and establishing survey boundaries in order to meet the criteria of financing and title insuring institutions. In view of the sanctions of the Subdivision Map Act (see e.g., Cal. Gov't Code §§ 66499.32, 66499.33, 66499.34 (Deering Supp. 1985)), Owner will prove that such institutions would have insisted upon procurement of a parcel map and that the Property could not be developed without their approval.

Appellees also rely on *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) in support of this point. Appellee B. p. 28. The suit in *Hodel*, however, was a facial challenge to a federal statute.

²⁵ In *Ogo*, the defendant city enacted an emergency ordinance imposing a moratorium *after the plaintiff applied for a building permit to which it was entitled as of right* under the then existing zoning ordinances. The case, in short, exemplifies the extraordinary power of California cities to prevent implementation of uses apparently allowed as a matter of right. See, e.g. Cal. Gov't Code § 65858 (Deering Supp. 1985).

The court held that no variance application was required.²⁶

The California Supreme Court also supports this position:

We are satisfied that the adoption of the open-space element of City's general plan, together with the strong wording of the amended zoning ordinance, . . . essentially foreclosed all administrative discretion. . . Accordingly, we conclude that all administrative remedies were exhausted by plaintiffs prior to seeking judicial relief.²⁷

To require Owner to proceed with further administrative processing in the face of Appellees' intransigence would consign it to endless administrative proceedings with negative results assured.²⁸

2. Owner's Petition For Administrative Mandate Pending In The State Court Has No Bearing On This Case.

Appellees argue that Owner's petition for administrative mandate currently pending in the state court renders this controversy not ripe for decision.

The argument lacks merit on two separate and independent grounds, either one of which is sufficient in and of itself. They are: (i) The sole remedy available in administrative mandate is a decree of invalidation. If Owner is entitled to just compensation, then invalidation is a constitutionally inadequate remedy. (ii) In any event, the California Court of Appeal in

²⁶ Note 3 *supra*.

²⁷ *Furey v. City of Sacramento*, 24 Cal. 3d 862, 871, 598 P.2d 844, 849, 157 Cal. Rptr. 684, 689 (1979). Federal decisions also hold that administrative remedies need not be exhausted where the exercise would be futile and a negative result clear. See, *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418 (1968); *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 (1934); and *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928). In *Lodge 1858, American Federation of Government Employees v. Paine*, 436 F. 2d 882, 896 (D.C. Cir. 1970), the court stated that "the exhaustion requirement contemplates an efficacious administration remedy, and does not obtain when it is plain that any effort to meet it would come to no more than an exercise in futility."

²⁸ Owner continues to rely on the doctrine of *Pacific Gas & Electric v. State Energy Resources Comm.*, 461 U.S. 190, 200-01 (1983) cited and quoted in Brief For Appellant at 28.

this case decided that Owner's Complaint failed to state a case for a taking. That determination in a case between the same parties on the same facts is *res judicata* and effectively decides the administrative mandate case for purposes of California law.²⁹

In short, even if California mandate provided an avenue to a constitutionally adequate remedy (which it does not) the mandate action is decided by this case.³⁰

C. The Issue To Be Decided In This Case, Whether A Compensation Remedy Exists Under The Just Compensation Clause For A Regulatory Taking, Is A Narrow Issue Which Does Not Challenge Government's Right to Govern.

Appellees' *amici* have raised many histrionic strawmen to keep the Court from deciding what must be decided.³¹ This case is *not* about the constitutionality of zoning, which was decided by the Court in 1926, nor about the importance of regulation, which is not in dispute here, nor about the wisdom or legality of agricultural preservation, which is not at issue here; nor is this case about a non-existent "right" to the most profitable or highest and best use of one's land.

²⁹ Brief For Appellant at 31-32.

³⁰ This case and the administrative mandate case were commenced in 1977, prior to this Court's decision in *Penn Central* and the California Supreme Court decision in *Agins I*. Thus, when the case was filed, it was not clear that California would never recognize a compensation remedy, nor had this Court articulated the ripeness concepts it was later to apply to land use, regulatory taking cases. Thus the petition for writ of mandate was filed by Owner to preserve all of its avenues in a climate of uncertainty and developing precedent. Such a petition does not call for a trial. It is tried on an administrative record without introduction of extrinsic evidence and is entitled to calendar priority. Owner filed the mandate case separately because it was not clear that mandate could be joined with other forms of civil action. Owner moved to consolidate the two cases, but Yolo County and Davis successfully resisted. JA 3. The Complaint and the petition are similar in their factual and charging allegations, differing in the relief sought.

³¹ Some of Appellees' *amici* rely heavily upon a recent law review article: Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984), cited herein as the "Manifesto." For (footnote continued)

This case concerns a very simple matter: whether a compensation remedy exists under the Just Compensation Clause for a land use regulatory taking,³² and more deeply, whether land use regulation is now to be treated differently by the courts from other exercises of the regulatory power, irrespective of its effects on the individual and irregardless of the fairness of a non-compensable remedy, not because such regulation is so vital to the community's security as to be exempt from normal judicial relief but merely because a government found to have violated a constitutional right *prefers* not to pay for a taking done for the general benefit.³³

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response, please see Berger & Kanner, *Thoughts On "The White River Junction Manifesto" From The Crucible Of Land Use Experimentation*. 19 Loy. L.A. L. Rev. 685 (1986) (cited herein as "Berger & Kanner"). Both of these articles are advocacy pieces, although Berger & Kanner more candidly acknowledge that fact. But as Berger & Kanner demonstrate in depth, the main thesis of the Manifesto hangs together only if this Court is prepared to treat land use regulations as *sui generis*, not governed by any of this Court's precedents on remedies for excessively burdensome governmental regulation and to be treated in a wholly separate category for analysis of separation of powers issues. The Manifesto provides no legal or constitutional justification for treating land use regulations in such a fashion other than its authors' fervent convictions.

³² Concerning land use and remedies for constitutional wrongs, see *Brief of Amici Curiae Lodestar Co., et al.*, for a full explication of Supreme Court precedent.

³³ While citing the "intent" of the authors of the Fifth Amendment is fraught with difficulty and the danger of self-serving argument, some of Appellees' amici attempt it to inconclusive effect. But one important reference, taken out of context, requires a response. The *Brief of Amici Curiae National Association of Counties, et al.*, at 7, n. 17, states that James Madison's essay, *Property*, concerned only "direct" takings of land or merchandise, calls Madison "the author" of the Bill of Rights, and then implies Madison must have meant not to have included land regulation by his use of terms (of course, the Fifth Amendment's authors and ratifiers never used the term "eminent domain," or "direct" or "indirect" for that matter, but used broader taking language). Whether or not all this is useful or relevant is beside the point that Madison in his essay immediately went on to say as well that any government "which indirectly violates [individuals'] property in their actual possessions . . . that such a government is not a pattern for the United States." 14 *The Papers of James Madison* 267 (R. Rutland ed. 1983). (Emphasis in original). The whole point of the essay, which was published on March 27, 1792, is that government must protect an individual's intangible freedoms and tangible property rights equally and to the fullest, exactly the point made by Justice Stewart for the Court on March 23, 1972 in his famous passage from *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (see *Brief*

D. This Case Concerns A Claim That Regulation Has Deprived Owner Of All Economic Beneficial Use Of Its Property. California Does Not Have The Right To Take Away All Economic Beneficial Use Of Property By Regulation And Contend That The Constitution Protects Only What Is Left.

Appellees and their amici argue that the scope of constitutionally protected interest is determined not by the Constitution itself but by state law. Since California law recognizes no protected interest in a potential use of the property³⁴ or a right to receive urban services, regulation which deprives a property owner of such potential use does not implicate a constitutionally protected interest.³⁵

But in this case, the Complaint establishes that (i) the regulation imposed upon the Property deprives it of *all economic beneficial use* and all reasonable investment-backed expectations, and (ii) *all* necessary urban services to support the development *are* available but for the decision of Yolo County and Davis to withhold them.

Appellees' argument amounts to nothing less than the contention that a regulation which deprives a property owner of

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for Appellant, at 27, n. 40). In any event, Madison rejected an "originalist" interpretation of the Constitution. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?* 73 Calif. L. Rev. 1482, 1500-01 n. 49 (1985).

³⁴ California does not recognize a protected interest in any use of property to which the owner has not perfected a vested right. *Pescosolido v. Smith*, 142 Cal. App. 3d 964, 191 Cal. Rptr. 415 (1983); *Del Mar v. Coastal Commission*, 152 Cal. App. 3d 49, 199 Cal. Rptr. 225 (1984).

³⁵ Appellees and their amici rely upon *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Court dealt with the claim of an untenured teacher that he had a constitutionally protected right either to be rehired after expiration of his contract or, in the alternative, a hearing meeting the standards of procedural due process in which he could challenge the reason why he was not rehired. *Board of Regents* is cited for the proposition that the scope of constitutionally protected property interest is defined by state law rather than the Constitution. This Court actually stated that the scope of such rights is "defined by existing rules or understandings that stem from an independent source such as state law . . .". 408 U.S. at 577. See also, *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), cited for the same proposition in the *Brief of Amicus Curiae State of California, et al.* at 5. *Texaco* concerns the power of a state to fix a time limit for assertion of property rights in order to avoid a claim of abandonment or title by adverse possession, a traditional area of state regulation which has nothing to do with a claim of regulatory taking.

all economic beneficial use of its property does not violate constitutional rights if the regulating state declares that it does not. This argument has the traditional approach to constitutional questions exactly backwards—and it directly conflicts with several recent pronouncements of this Court to the contrary.³⁶

As Professor Tribe explains, there is in fact no practical difference between physically seizing property and preventing its owner from using it:

Thus a clear case is one that intuitively seems like a taking in the layman's sense of that term: a physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusion that are typically associated with rights of property. Moreover, forcing someone to stop doing things with his property—telling him “you can keep it, but you can't use it”—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus a “taking” occurs in this ordinary sense when government controls a person's use of property so tightly that, *although some uses remain to the owner, the property's value has been virtually destroyed*. L. Tribe, *American Constitutional Law* 460 (1978).

Nothing in the Court's recent decisions or the concept articulated by Professor Tribe suggests that the constitutional protection is as limited as the regulating state may choose to make it.

E. The Complaint Alleges A Regulatory Taking.

1. This Case Is Not Controlled By *Penn Central* Where The Owner Was Allowed Both A Reasonable Use And Compensation.

³⁶ See, e.g., *Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187, 2196 (1984):

We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.

Appellees argue that Owner's case is defeated by the Court's holding in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). That result flows, they contend, from the fact that the Property is only part of a larger holding which includes the Connecting Property and 108 acres lying to the east of the Property (the “108 Acres”) zoned and planned for agricultural use, and not projected for annexation to Davis.³⁷

In *Penn Central*, the property owner conceded that it had a reasonable use from which it was realizing a reasonable return from one of the “discrete segments” (438 U.S. at 130), i.e., the existing land and building. The restrictions of the Landmark Preservation Law did not absolutely prohibit changes in the land and building—they permitted a certain degree of enhancement of the building which could increase its profitability. 438 U.S. at 129. Moreover, the scheme of regulation provided the landowner with compensation for the restriction imposed on the remaining segment, the air space over the existing building. *Neither reasonable use, enhancement of reasonable use nor compensation in any form are available to Owner in this case.*

Appellees argue that the Connecting Property, the Property and the 108 Acres should be viewed as “discrete segments” of a single parcel because they are all parts of one tax parcel. In *Penn Central*, the land, the building and the air space were all parts of one tax parcel as well. *They were also subject to the same zoning and use restrictions, however, a condition which does not obtain here.*

Aside from the utterly irrelevant Assessor's parcel designation,³⁸ Yolo County and Davis have *never* treated all of Owner's holdings as discrete segments of a unitary whole which

³⁷ Appellees' raise this argument for the first time in their Brief on the Merits. This Court has held that as a general rule it will not consider an issue not passed on below. *Singleton v. Wolff*, 428 U.S. 106, 120 (1976).

³⁸ Assessor's tax parcels are a part of the data used by the assessor in discharging responsibilities under Cal. Rev. & Tax. Code §§ 601 and 602 (Deering Supp. 1985). The Code does not prevent the Assessor from valuing portions of a single tax parcel at a higher or lower value than any other portion, nor does it prevent the imposition of special taxes or rates on some portions of the parcel, said taxes or rates not being applicable to other portions.

should be regulated as one parcel in order to achieve some overriding objective. They have in fact regulated them separately. The only unifying thread has been denial of all requests to use each "discrete segment" in a manner which meets minimal constitutional requirements.³⁹

None of the restrictions imposed on any portion of Owner's holdings have been imposed in contemplation of the fact that they are justified by a use allowed to Owner on the balance of its holdings (preservation of such use being the main purpose of the historic preservation law at issue in *Penn Central*), nor is any compensatory mechanism provided or offered by Yolo County or Davis for the burden imposed by the restriction.

2. Valid Exercises Of Governmental Regulatory Power Can Nonetheless Effect A Taking. The Argument That A Valid Exercise Of Regulatory Power Can Never Constitute A Taking Flies In the Face Of Decisions Consistently Reached By This Court.

This Court has consistently and recently held that the legitimacy of governmental goals served by regulation does not foreclose a claim that the burden of the regulation works a taking due to the impact upon the property owner.⁴⁰ Governmental liability under the Fifth Amendment is not limited to those instances where the government *intends* to be liable.⁴¹

To the extent that Appellees and their *amici* can be viewed as arguing that the rule ought to be different in cases dealing with land, they can point to no support for such a distinction drawn in any opinion by this Court. They must overcome clear

³⁹ The Connecting Property lies within the boundaries of Davis and is subject to Davis' housing allocation requirements. The Property lies within Yolo County and is zoned and planned for *residential use*, albeit subject to Yolo County's general plan policy prohibiting the implementation of such uses until the necessary services are available from annexing cities. *The 108-acre parcel is zoned and planned for agricultural use*. Appellees themselves have treated the Connecting Property, the Property and the 108 Acres as three separate parcels for planning purposes.

⁴⁰ *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979), *Agins II*. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *United States v. Security Indus. Bank*, 459 U.S. 70, 74-75 (1982).

⁴¹ In *Hughes v. Washington*, 389 U.S. 290, 298 (1967), Justice Stewart concurring stated:

[T]he Constitution measures a taking of property not by what a State says, or by what it intends, *but by what it does*.

expressions to the contrary in *Berman v. Parker*, 348 U.S. 26, 33, 36 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (eminent domain's "public use" requirement is "coterminus" with that of the police power). And if their thesis had any validity, then this Court went to a lot of trouble it could have avoided in *Penn Central*, *Agins II*, and *Hamilton Bank*.

3. The Constitution Does Not Distinguish Between "Temporary" And "Permanent" Takings. A Taking Is No Less Of A Taking For Being Temporary.

Appellees or their *amici* cannot explain why a taking is any less damaging for being "temporary" in its impact on the property owner.⁴² Nothing in their nature renders regulations inherently less permanent than exercises of the power of eminent domain to achieve the same purpose. This case provides a prime example. Had Yolo County or Davis acquired an open space easement over the Property, that easement could be abandoned at any time before or after payment of compensation. See *San Diego* dissent, 450 U.S. at 658.⁴³

Even physical taking cases, such as the airplane overflights in *Causby* and *Griggs*,⁴⁴ can be temporary or permanent. Until a court acts or the government declares its intention, no one can read an agency's mind as to how long a non-eminent domain taking will go on—two years, ten years, indefinitely? What matters is allowing the trier of fact to determine whether a regulatory taking has happened and/or is happening.

⁴² "On the merits, Justice Brennan [in *San Diego*] concluded quite reasonably that, although nothing in the Compensation Clause empowers a Court to compel the government to exercise its power of eminent domain where the regulatory 'taking' is temporary and reversible and the government would rather end the 'taking' than purchase the property, the government must compensate the property owner for whatever taking occurred between the enactment and the repeal of the offending regulation." L. Tribe, *Constitutional Choices*, 385-86, n. 23 (1985). See also Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 193 (1984).

⁴³ Appellees' argument depends on an acceptance of a *sui generis* treatment of land use regulation, as opposed to all other forms of governmental regulation. It would hardly be suggested that a public employee or tenured professor, wrongfully deprived of his job, could be fully compensated by a decree of invalidation. His claim for back pay would not be rejected on the grounds that all of us in an organized society must bear the risk that our regulatory processes occasionally go wrong or that our supervisors occasionally make mistakes.

⁴⁴ See discussion in Brief for Appellant, at 24.

In order to make that determination, we propose the following standard to the Court to supplement the analysis provided by the dissenters in *San Diego*: Once a government rejects an application for a property's use that otherwise clearly meets the zoning, subdivision and other code requirements applicable to the property, the government must provide a practical means by which the owner can determine what reasonable alternative use remains in the property.⁴⁵ In virtually every situation in which an application is rejected, the government can easily meet that standard because either legal noncompliance is involved or a different application for the use of an individual's property will be permitted.⁴⁶

In the instant case, however, the proposed use of the Property is residential because that is how Yolo County has general planned it, zoned it and taxed it and that is the use Yolo County deems most appropriate.⁴⁷ Yet, as the Complaint

⁴⁵ If such determination is made in a special exception or use permit proceeding, the agency will have at least one year to ponder the owner's claims. Cal. Gov't Code § 65950 (Deering Supp. 1985). See also Cal. Gov't Code § 65943 (Deering Supp. 1985). In any such proceeding, the owner is required to submit all of its evidence and legal arguments before the agency. Issues and arguments not timely and fully raised before the administrative body cannot be raised on judicial review. *Coalition for Student Action v. City of Fullerton*, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984); *City of Walnut Creek v. County of Contra Costa*, 101 Cal. App. 3d 1012, 162 Cal. Rptr. 224 (1980).

⁴⁶ One possible approach for addressing the mutual problem of landowner and local government uncertainty is the imposition of reciprocal obligations upon the two. For its part, the landowner would have to notify the local government, prior to bringing its "takings" legal action, that it viewed the allegedly offending action as a "taking." The local government would then have a chance to modify its action. Such a notification rule may be viewed as part of the ripeness/exhaustion analysis of a "takings" claim, where the judicial inquiry centers on whether the local government under any circumstances will allow the landowner a beneficial economic use of its property. For its part, the local government would have to do more than simply reject a landowner's proposed plan while arguing that it might approve another use. The local government would have to indicate to the landowner, in broad outline, what it would allow. In this way the landowner would not be left with a potentially endless cycle of application-rejection-application, and a reviewing court would not be forced to speculate whether the local government may allow a constitutionally adequate use. Kayden, *When Is a Regulatory Taking Effective: The Timing Issue*, Monograph No. —, Cambridge: Lincoln Institute of Land Policy (forthcoming 1986).

⁴⁷ Some Amici Curiae call the Property a "farm" (Brief of Amici Curiae American Farmland Trust, et al.), which is grossly misleading. The Property, as we pointed out in Appellant's Brief, is acknowledged to be agriculturally impaired even by the Board.

alleges, Yolo County has enacted a general plan policy that prevents approval of any use other than agriculture and open space. The government's intention is clear. If this Court would simply hold that *Agins I* is contrary to constitutional law and thus was inappropriately applied by the lower court to this case and then remand the case for trial, standard takings analyses and burdens can be applied by judge and jury to the facts and valuation determined just as in an eminent domain case.

F. Just Compensation Is The Only Constitutional Remedy For A Taking.

1. Compensation Is The Preferred Remedy. Appellees Have Simply Sought To Ignore The Decisions Of This Court Declaring That Compensation Is The Remedy To Be Preferred Over Equitable Relief Or Invalidation.

Owner relies on opinions of this Court holding that payment of just compensation is the preferred remedy over decrees of invalidation or equitable relief.⁴⁸ *Appellees simply fail to acknowledge the existence of these authorities let alone attempt to deal with the principle they express.*

2. The Chilling Effect Argument Is Constitutionally Irrelevant, Empirically Insupportable And Contrary To Decisions Of This Court And Other State Courts.

Relying on *Agins I*, some of Appellee's amici state that the imposition of monetary damages would have a chilling effect upon innovative planning and stultify important exercises of the police power.⁴⁹

⁴⁸ In its Brief For Appellant, Owner cited *Regional Rail Reorg. Act Cases* 419 U.S. 102 (1974); *City of Fresno v. California*, 372 U.S. 627 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Hurley v. Kincaid*, 285 U.S. 95 (1932). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Ruckelshaus*, 104 S. Ct. 2862 (1984); *Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187 (1984) and *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703-04 (1949).

⁴⁹ Amici argue that the cost should be borne by the random victim rather than those who benefit. In *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) and *Armstrong v. United States*, 364 U.S. 40 (1960), this Court declared the opposite.

California recognizes strict liability in physical invasion cases—compensating diminutions in value based on *highest and best use* (Brief for Appellant 24, n. 38)—without regard to the foreseeability of the injury and on the basis of the most attenuated causal connection. Although Appellees and their *amici* include among their number literally dozens of public agencies and conservation organizations, *they cite this Court to no empirical study of any kind at all suggesting that this degree of strict liability—which poses a far higher threat of monetary liability than any for which Appellant argues here—has had any chilling effect of any kind whatsoever on the construction of public improvements.*⁵⁰

Since *San Diego*, at least eleven state high courts have stated (or re-stated) that compensation is required for a land use taking.⁵¹ Appellate courts in at least six other states had so ruled prior to *San Diego*.⁵² No state supreme court case has followed *Agins I*.⁵³ If there was any evidence of fiscal chaos, stultified planning processes, or torrents of litigation in the states and federal circuits⁵⁴ that recognize just compensation as

⁵⁰ Nor do they cite studies to show that liability for airplane overflight has stultified development of civil aviation or the growth of air travel since *United States v. Causby*, 328 U.S. 256 (1946). Because they offer nothing, the Court is entitled to presume that any such material does not exist or would be unfavorable if it does. Cal. Evid. Code §§ 412, 413 (West 1966).

⁵¹ See Brief for Appellant, at 16, n. 22.

⁵² *Hermanson v. Board of County Comm'r*, 42 Colo. App. 154, 595 P.2d 694 (1979); *Brecciaroli v. Connecticut Comm'r of Env'tl Protection*, 168 Conn. 349, 362 A.2d 948 (1975); *Ventures in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979); *Washington Market Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39, 278 N.E. 2d 658, *cert. denied sub nom. Chongris v. Corrigan*, 409 U.S. 919 (1972) (Douglas, J. dissenting); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).

⁵³ Neither Appellees nor any of their *amici* have cited a state supreme court case (outside of California) which follows *Agins I*. To the extent that the approach of the New York Court of Appeal may be viewed as similar, its reasoning was firmly rejected in *Penn Central's* majority and dissenting opinions (dissent by Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens).

⁵⁴ Seven federal courts of appeal have cited approvingly to Justice Brennan's *San Diego* dissent. See Brief for Appellant, at 16, n. 22, and *Hamilton Bank of Johnson City v. Williamson County Regional Planning Comm'n*, 729 F.2d 402 (6th Cir. 1984), *reversed on other grounds*, 105 S. Ct. 3108 (1985). The First Circuit, however, declined to acknowledge land use compensation claims within its federal jurisdiction, saying an owner should bring a tort action in state court. *Citadel Corp. v. Puerto Rico Hwy. Auth.*, 695 F.2d 31 (1st Cir. 1982).

a remedy, presumably Appellees and their *amici* would have presented it.⁵⁵

A just compensation remedy must be an element of relief to give meaning to the constitutional right and to act as a disincentive to regulatory takings of all or substantially all economic use of land. *Owen v. City of Independence*, 445 U.S. 622, 650-52 (1980).

Since the California courts⁵⁶ hold that their view of the law will prevail even when it conflicts with decisions of this Court, *nothing short of a definitive declaration to the contrary will suffice*. See *Gilliland v. County of Los Angeles*, 126 Cal. App. 3d 610, 617, 179 Cal. Rptr. 73, 78 (1981).⁵⁷

⁵⁵ Even though inverse condemnation actions for land use takings have been brought throughout the United States since the early 1970's, neither Appellees nor their governmental groups *amici* can point to a single excessive jury award. A regulatory taking is much harder to prove than, say, the commission of a tort. Additionally, property owners, when they go to court, in the vast number of cases seek invalidation or a permit, for they want to use their land. It is the rare case in which an owner seeks compensation; that occurs once he realizes that all or substantially all reasonable use will be denied. Also, builders are loathe to sue governments over development decisions, particularly for damages, because, unlike other citizens who may sue the government for damages, builders know they must reappear before the same agencies with other development applications in the future. Finally, for the many years the inverse condemnation action has been available in the lower courts, American land use planning has been as vigorous as ever.

⁵⁶ Concerning the unusual California court system's approach to land use cases, see Brief of Amici Curiae First English Evangelical Lutheran Church of Glendale, et al. For an explanation of American land use practice in general and of California's extreme and peculiar approach in particular, see R. Babcock and C. Siemon, *The Zoning Game Revisited* (1985) (excerpted substantially in above Amici Brief).

⁵⁷ There were two *Gilliland* cases: *Gilliland v. County of Los Angeles*, *supra*, and *Gilliland v. City of Palmdale*, 127 Cal. App. 3d 386, 179 Cal. Rptr. 627 (1981), both dealing with governmental denial of use of different parts of the same parcel of property, part of which was in the city and part within the county. Both cases were filed in state court seeking relief under 42 U.S.C. § 1983 and decisions affirming dismissal were issued by two different Court of Appeal panels at virtually the same time. In the county case, the Court said it would abide by the California Supreme Court's view even if it was contrary to the view of this Court. 126 Cal. App. 3d at 617. The panel of the Court of Appeal reviewing the city case, examined California law in light of opinions in this Court and concluded that "*California's position flatly contradicts clear precedent of United States Supreme Court cases . . .*". 179 Cal. Rptr. at 631.

(footnote continued)

3. A Decision By This Court That The Fifth Amendment Requires Payment Of Just Compensation Will Decrease Rather Than Encourage Federal Litigation Of Regulatory Taking Cases.

Appellees and some of their *amici* argue that a decision for Owner in this case will unleash a flood of federal court litigation. *The exact opposite is true.*

Property owners can state a case for just compensation in federal court. See, e.g. *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1985); *Martino v. Santa Clara Valley Flood Water District*, 703 F.2d 1141 (9th Cir. 1983) *cert. denied* 464 U.S. 847 (1983); *Kinzli v. City of Santa Cruz*, 539 F.Supp. 887 (N.D. Cal. 1982). They know that they have *no just compensation remedy* in California state court under *Agins I*.

This divergence between forums has pulled complex California land use controversies into federal courts, confronting federal district judges and the federal court system with difficult issues of state statute and local ordinance interpretation—and agonizing abstention problems. See, e.g. *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984).

In *Hamilton Bank*, this Court stated that where state law recognizes a compensation remedy, state remedies *must* be pursued before an action may be commenced in federal court. A clear expression by this Court that the Fifth Amendment requires payment of just compensation for excessively burdensome regulation would reverse *Agins I* and require California courts to provide a just compensation remedy. Opening that state avenue to relief would virtually eliminate land use taking cases from federal district court dockets and reduce—rather than increase—the burden of federal court litigation.

4. Invalidation Is A Worthless Remedy In California.

In the Brief for Appellant at 17-20, we showed how invalidation was a worthless remedy. Appellees and *Amici*

(footnote continued from previous page)

The California Supreme Court declined to review the decisions. In doing so, however, it ordered the city case deleted from the Official Reports. (See, Rule 976(c)(2), Cal. Rules of Court), thus making the critical analysis non-citable. (Rule 977(a), Cal. Rules of Court).

Curiae State of California, *et al.*, dispute the contention, each citing a host of cases in which, they contend, California courts have granted the remedy of invalidation. (Briefs for Appellees, at 48, n. 63, and For *Amici Curiae* State of California *et al.* at 21-20, n. 26).

The cases cited by Appellees and California include cases concerning (i) the facial validity of regulatory ordinances,⁵⁸ (ii) ordinances invalidated as "spot zoning",⁵⁹ (iii) ordinances invalidated as not properly related to valid objects of police power regulation,⁶⁰ (iv) conditions applicable to development approvals stricken—not because they were excessively burdensome as to the permittee—but because they were not reasonably related to the permitted activity and hence were invalid exercises of the police power,⁶¹ (v) illegal uses of the zoning power to depress value in contemplation of condemnation,⁶² and (vi) unreasonable precondemnation activity.⁶³

In short, the authorities cited by Appellees and their *amici* simply do not address the point Appellant raised. Their effort *reenforces, rather than disproves*, our argument.⁶⁴

⁵⁸ *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

⁵⁹ *Arnel Development Co. v. City of Costa Mesa*, 126 Cal. App. 3d 330, 178 Cal. Rptr. 723 (1981).

⁶⁰ *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981).

⁶¹ *Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982); *Liberty v. California Coastal Commission*, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980); *Bank of America v. State Water Resources Control Board*, 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); *Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin*, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

⁶² *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P. 2d 10 (1958).

⁶³ *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). Cf. *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978).

⁶⁴ Of the cases they have cited, only two not cited by Appellant are marginally relevant. *Hoshour v. County of Contra Costa*, 203 Cal. App. 2d 602, 21 Cal. Rptr. 714 (1962), an appellate decision nearly a quarter century

(footnote continued)

CONCLUSION

For all of the above reasons, and for the sake of constitutional uniformity nationwide and because of the Fifth Amendment's principle of fundamental fairness, Appellant has clearly demonstrated its right to a trial.

March 19, 1986.

Respectfully submitted,

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(footnote continued from previous page)

old invalidated as excessively burdensome setback requirements on a single family lot which left the lot owner usable space for nothing more than a doll house, and *San Leandro Rock Co. v. City of San Leandro*, 136 Cal. App. 3d 25, 185 Cal. Rptr. 829 (1982), which is a truck weight regulation case. If Appellees' position were well taken, the California reports would contain many cases similar to *North Sacramento Land Co. v. City of Sacramento*, 140 Cal. App. 3d 576, 189 Cal. Rptr. 739 (1983), a case which deals directly with land use regulation—as opposed to regulation of truck weights—and squarely holds that the regulation, although a valid exercise of the police power, may be invalidated as excessively burdensome as to a specific property owner. In the last two decades, there has been only one such case.

AMICUS CURIAE

BRIEF

DEC 12 1985

JOSEPH F. SPANGLER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES,
a partnership,*Appellant,*

v.

THE COUNTY OF YOLO
and
THE CITY OF DAVIS,*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF MID-AMERICA LEGAL FOUNDATION
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Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF MID-AMERICA LEGAL FOUNDATION
AS *AMICUS CURIAE* SUPPORTING APPELLANT

This brief *amicus curiae* in support of appellant is submitted with the written consents of counsel to all parties filed with the Clerk of the Court.

INTEREST OF *AMICUS*

Mid-America Legal Foundation has an interest in the disposition of this case which is before this Court on appeal from the Supreme Court of California. The Foundation was organized to support the public interest in preserving the economic and political freedoms of our democratic society.

Mid-America seeks to present a broad perspective on the important taking issue involved in this case based upon the Foundation's long-standing concern with the proper relationship between government regulation and the protection afforded by the United States Constitution. The California Supreme Court has allowed a local public body through land use regulation to deny a property owner the beneficial use of his property without affording any meaningful relief for the taking effected by this government action. The practical consequence of this decision is to immunize regulatory government takings from the constitutional sanctions that apply to the exercise of the power of eminent domain.

SUMMARY OF ARGUMENT

Police power regulation can result in a Fifth Amendment taking as effectively as formal condemnation where the use and enjoyment of private property is destroyed in order to promote the public good. Here the action of the County in disapproving the subdivision map proposing residential development deprived the landowner of any beneficial use of his property and precluded a reasonable return on his investment. Unless regulatory actions such as these are recognized as takings, the protection the Fifth Amendment affords private property will become illusory.

ARGUMENT

Historically the Fifth Amendment of the United States Constitution has prohibited government from taking private property for public use without just compensation.¹ When the government exercises its power of eminent domain, the Constitution requires that compensation be paid.

Takings as complete as those accomplished through formal condemnation proceedings, however, can be effected just as readily through exercise of the police power. In this context, land use regulations can restrict the use of property to such an extent that a property owner effectively is denied any beneficial use of the property and is prevented from receiving any reasonable return on his investment. Such use of the police power is as much a taking as if title to the property actually had passed to the public body. To characterize this regulatory action as something other than a taking is to elevate form over substance and make illusory the constitutional protection afforded private property by the Fifth Amendment.

The County Disapproval of Appellant's Subdivision Map Effected a Taking of Private Property.

In the instant case, the action of the County of Yolo ("County") in disapproving appellant's subdivision map solely on the ground that residential development of the property was opposed by the City of Davis ("City"), effectively denied the property owner any beneficial use of the property thereby preventing a reasonable return on investment.

The record below supports no other reasonable conclusion. Although the property has been designated for residential development in the County's general plan and zoning ordinances since 1966, (Joint App. at 116), the effect of the

¹ The Fifth Amendment of the U.S. Constitution has been made applicable to the states through the Fourteenth Amendment. See, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

County's disapproval is to allow only agricultural use of the property. Agricultural use of the property, however, has been impaired by sale of the topsoil to the State of California. (Joint App. at 74).

While the County's decision purports to be based on a failure to provide the development with essential services required by the County General Plan and zoning ordinances, the only reason these services could not be provided is the City's refusal to provide them and to make the required dedications. (Joint App. at 117). Such refusal, coupled with the County's action, ensures the continued classification of the property in an unusable category.

A review of case law on takings accomplished through exercise of the police power supports the contention that appellant's land was taken in a constitutional sense by the action of the County Board.²

In the landmark decision of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), this Court stated that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." In *Mahon*, the owner

² Although there is no specific state statute or municipal zoning ordinance challenged in this case, that does not mean, as appellees suggest, that there is no jurisdiction for the Court to decide this case. Appellant's plan was disapproved because of a change in the City's general plan. As the California Supreme Court emphasized in *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774 (1965), the general plan is a guide to land use control and affects land market values. "The general plan is legislatively adopted by the council. Any subdivision or other development would necessarily be considered in relation to the general plan, and such consideration practically by itself would be a sufficient legislative guide to the exercise of such discretions." 213 Cal. App. 2d at 782. Appellant's case is different from that of the plaintiff in *Selby Realty Co. v. City of Buenaventura*, 10 Cal. 3d 110 (1973), where the court appeared to minimize the impact of the city's general plan on the plaintiff's property. In that case, however, the plaintiff had not presented the County with any plan for actual development as did the appellant in the instant case.

of land containing coal deposits had deeded away the surface rights, but reserved the right to remove all the coal deposits beneath the surface.

In their contract with the landowner, the grantees assumed the risk and waived all claim to damages that might arise from the mining. Subsequently, a state statute was enacted which forbade mining in such a way as to cause subsidence of any human habitation, thus making the owner's future mining plans economically impracticable. This Court held that the statute's prohibition exceeded the police power and contravened the owner's rights under the contract clause and the Fourteenth Amendment of the United States Constitution. This Court's decision implied that when a landowner is deprived of all reasonable expectation of a return on his investment by regulation, this is tantamount to a taking.

What was dealt with by way of implication in *Mahon* was confronted directly in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978). Under the New York Landmarks Law, the Grand Central Terminal, owned by Penn Central, was designated as a landmark site. Thereafter, Penn Central entered into a lease with UGP Properties. According to the terms of this lease, UGP was to construct a multistory office building over the Terminal. The Landmarks Preservation Commission, however, disapproved the plans for such a building, stating that it destroyed the Terminal's historic and aesthetic features. Penn Central then brought suit in state court contending that the Commission's application of the Landmarks Law had taken their property in violation of the Fifth and Fourteenth Amendments. This Court, however, ruled that the Landmarks Law had not effected a taking because it did not prevent Penn Central from realizing a "reasonable return" on its investment. The Court pointed out that Penn Central still retained the present uses of the Terminal and had failed to show that a smaller, more harmonious structure would not be permitted by the Commission. Therefore, although the Land-

marks Law might have diminished the value of the property, the Court stated, there could be no taking unless an owner was deprived of all "reasonable return" on his property.

Unlike *Penn Central*, the landowner here has no viable alternative uses for the property. Residential development has been foreclosed by the concerted actions of the County and the City. Any economical agricultural use has been impaired by earlier action removing the topsoil and by residential development adjacent to the property which restricts farming methods.

The *Penn Central* standard was followed in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where this Court ruled that there was no taking when the City limited landowners to building one to five homes on a five-acre tract after they had acquired the unimproved parcel in a prime residential area. The Court cited *Penn Central* for the proposition that the application of a general zoning law to a particular property effects a taking only if the ordinance denies the owner an economically viable use of his land. The Court then stated:

Although the ordinances limit development, they neither prevent the best use of appellant's land, nor extinguish a fundamental attribute of ownership. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the state, and that the best possible use of the land is residential. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments. (Citation omitted).

447 U.S. at 262-263.

The following year, in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), this Court was asked to decide the issue of whether a state must provide a monetary remedy to a landowner whose property was taken by a regulatory zoning ordinance. The majority ruled that the Court did not have jurisdiction of the case because of the absence of a final judgment by a state court and did not reach the merits.

Three Justices, Brennan, Powell and Stewart, dissented from this ruling. Justice Brennan, writing for the dissenters, stated that police power regulations, such as zoning ordinances or other land use restrictions, can destroy the use of property just as effectively as formal condemnation procedures or physical invasions of the property.

From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use.

.

It is only logical then, that government action other than the acquisition of title, occupancy or physical invasion can be a "taking" and, therefore, a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interests in the property. (citations omitted).

450 U.S. at 652-653.

Under the law discussed above, the facts in the instant case clearly demonstrate a regulatory taking by the concerted action of the County and City. Unlike property owners in *Penn Central* and *Agins*, appellant in this case cannot expect a reasonable return or, for that matter, any return on his investment in the property. The *Agins* landowners could build up to five houses on their property. The *Penn Central* Transportation Company could continue to use its Terminal and also

had the option of constructing a more harmonious structure on the property or transferring the air rights to adjacent property. In the instant case, however, appellant who had purchased the land when it was zoned for residential use, was not permitted to develop it for this purpose because of the City's designation of the parcel as agricultural reserve in its general plan and its refusal to supply the property with the necessary municipal services. Furthermore, even though the property nominally could be used for agricultural purposes under the City's plan, the Yolo County Board of Supervisors noted in its findings that it was impaired for agricultural use because the topsoil had been removed. (Joint App. at 74). Under these circumstances, there can be no doubt that the disapproval of the subdivision map destroyed any economically viable use of the property.

The facts in the instant case are similar to those in *Mahon* where this Court ruled there had been a taking. In the *Mahon* case, the owners had a reasonable expectation that they could mine the land because they had contracted to do so. A subsequently enacted state statute deprived them of that right. Here, appellant bought the property with a reasonable expectation that it could be developed residentially since it was zoned for that use by both the County and the City. A subsequently enacted City plan and the actions of the County board deferring to the legislative decision of the City council reflected in that plan have prevented that use. The County has limited not just the property's use by its findings; it has prohibited that use completely and therefore, has taken the appellant's property.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California, should be reversed and the case remanded for proceedings consistent with the rights of appellant.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(7)
No. 84-2015

Supreme Court, U.S.

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In The
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October Term, 1985

— o —
MacDONALD, SOMMER & FRATES, a Partnership,
Appellant,
v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

— o —
On Appeal from the Supreme Court of California

— o —
**BRIEF AMICUS CURIAE OF ADIRONDACK
PARK LOCAL GOVERNMENT REVIEW
BOARD, EMANUEL GYLER, AND
PACIFIC LEGAL FOUNDATION IN
SUPPORT OF APPELLANT**

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No. 84-2015

In The
Supreme Court of the United States
October Term, 1985

MacDONALD, SOMMER & FRATES, a Partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal from the Supreme Court of California

**BRIEF AMICUS CURIAE OF ADIRONDACK
PARK LOCAL GOVERNMENT REVIEW
BOARD, EMANUEL GYLER, AND
PACIFIC LEGAL FOUNDATION IN
SUPPORT OF APPELLANT**

INTEREST OF AMICI

Pursuant to Supreme Court Rule No. 36, Adirondack Park Local Government Review Board, Emanuel Gyler, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of appellant. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Adirondack Park Local Government Review Board (Review Board) represents the elected governments of the 12 counties which collectively comprise New York State's Adirondack Park and was created to monitor the implementation of the state's land use plan for this region. See N.Y. Exec. Law § 803-(a) (McKinney 1982). The Adirondack Park itself consists of six million acres, an area larger than the Commonwealth of Massachusetts. Over 60% of the land within the boundaries of the park are privately owned and subject to what is perhaps the most extensive and stringent set of land use restrictions in the country. See, e.g., R. Liroff and G. Daves, *Protecting Open Space—Land Use Control in the Adirondack Park* (1981).

On the basis of its 12-year existence, the Review Board can attest to the overwhelming opposition which the state's land use plan has aroused among the 130,000 residents and the local governments of the Adirondack Park region, an opposition based in large part on the view that this plan violates private property rights. For example, over 90% of the 107 towns within the park have refused to adopt the state's plan in their own zoning codes. The Review Board believes that the articulation by this Court of a clear standard on how the legitimate interests of property owners are to be balanced against those of government will provide a needed degree of certainty in this area of the law—an element which is necessary if there is to be a resolution of the continuing controversy over the state's land use plan.

Emanuel Gyler is the owner of an oceanfront lot in Oxnard Shores, a subdivision in the City of Oxnard, California. Mr. Gyler purchased the lot in 1973 with intent

of building a single-family dwelling on the property, a use consistent with the applicable zoning ordinances. Mr. Gyler first applied to the California Coastal Commission, a state agency with land use regulatory powers, for a coastal development permit in 1977. This application was denied because of concern that beach erosion would endanger the dwelling and construction of the dwelling would exacerbate erosion. In 1980, the City of Oxnard adopted a local coastal program (LCP) as required by the California Coastal Act of 1976. Because the LCP permitted construction of homes on oceanfront lots in Oxnard Shores, Mr. Gyler again applied for a coastal development permit. This second application was denied. Subsequently, in 1981, the California Coastal Commission certified the City of Oxnard's LCP, which continued to authorize the construction of homes on oceanfront lots. Believing that this action indicated commission approval of the concept of home construction in the area, Mr. Gyler again applied for a coastal development permit. However, in July of 1982, his third application was denied.

During the course of Mr. Gyler's efforts to obtain a coastal development permit, he offered to submit plans to the California Coastal Commission to provide the commission with an opportunity to amend his plans to make development on his lot possible. Mr. Gyler offered to post a bond in an amount sufficient to have his proposed house demolished should circumstances change and it be determined that the house should be removed. Mr. Gyler offered to dedicate a portion of his property to the public to provide access to the beach to ameliorate the concern that construction on his property would burden public access. However, the commission has refused to accept any of

these offers. Since 1977 Mr. Gyler has applied three times for a coastal development permit to construct a residence and three times his application has been denied. At all times the property was zoned for only residential use and his proposed residence would require no variances. Yet Mr. Gyler still does not have a final decision which conclusively establishes he will not be allowed to construct a dwelling on his property. Neither does he have any use of the property. Mr. Gyler believes that clarification by this Court of the constitutional standards for when a property interest has been taken by regulation is necessary or property owners such as he will be left with no recourse for land use regulation which repeatedly denies reasonable and appropriate use for year after year.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting broad public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees, composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that Pacific Legal Foundation's position has broad support within the general community. Pacific Legal Foundation's Board of Trustees has authorized the filing of this brief to support its belief that the Just Compensation Clause of the Fifth Amendment to the United States Constitution was intended to ensure that individual owners of private property are not compelled by government action to bear burdens that should rightfully be borne by the public as a whole. If individual rights in property are to be preserved the constitutional

guarantee that just compensation must be paid when private property is taken by government must be applied to situations in which a taking results from government regulation of the use of property.

The public policy perspectives of amici in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

OPINION BELOW

The opinion of the Court of Appeal for the Third Appellate District, State of California, is not published. A copy of the opinion is contained in the Joint Appendix (JA) at 115.

SUMMARY OF ARGUMENT

1. The "final decision" standard established in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S. Ct. 3108 (1985), is based on the ripeness doctrine. It is not a substantive rule which requires that a property owner obtain an immutable decision denying all economically viable use of the land before a claim can be stated for violation of the Just Compensation Clause. The requirement is met when the property owner has submitted a reasonable proposal for use and that request has been denied by a final decision on that proposed use.

2. The right to make reasonable use of property is the essence of the constitutional concept of protected interests in "private property." This general right of use ripens into a protected interest in a certain use when the circumstances of an individual situation give rise to a legitimate expectation in the property owner that a particular use will be allowed. The existence of a protected expectation of use is determined by balancing the governmental interest in denying the use against the reasonableness of the property owner's expectation of use to determine whether, under the facts of the particular case, the economic loss involved is properly borne by the property owner alone or, in the interests of justice, should be borne by the public as a whole.

3. Clarification of the constitutional standards governing the broad discretion typically granted to regulators of property use will contribute to responsible and objective land conservation and management programs. Unbridled discretion in property regulation promotes ad hoc decision making which destroys the elements of certainty and predictability essential to any concept of protected interests in property. Potential liability under a balancing test is limited and will promote consistent and neutral enforcement of rational and objective planning criteria and zoning standards, which in turn will protect municipalities from any significant threat of financial loss.

ARGUMENT

I

THE FINAL DECISION REQUIREMENT OF WILLIAMSON COUNTY IS NOT A SUBSTANTIVE RULE GOVERNING WHEN A TAKING OCCURS

The District Court of Appeal ruled in this case that "[t]he denial of that particular plan cannot be equated with a refusal to permit any development [T]he refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." JA at 123. The rule utilized by the court below is not supported by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S. Ct. 3108. The rule articulated in Williamson County is not a substantive rule regarding when a taking occurs. It is a rule regarding when an agency decision becomes ripe for judicial review.

It is clear from the opinion of the Court of Appeal that it considered the *decision* by the County of Yolo (County) to be ripe for review, inasmuch as the court stated appellants could obtain judicial review of the County's decision by way of writ of mandate. JA at 121. Nonetheless, the court ruled that the taking claim had not accrued because it was not clear from the decision of the County that it would refuse to allow "any development." *Id.* The effect of this ruling is to establish a substantive standard denying appellants a constitutional claim whenever a final decision denying a proposed use leaves open

the opportunity to request future approval of any other "valuable development."

Such a final action rule would for all practical purposes make it impossible for a property owner to establish that he or she is entitled to compensation. Under most land use regulatory schemes an immutable decision setting allowed use cannot be obtained. Under California land use procedures, permission to develop property is treated as an "advantage" granted the property owner by government. See *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 325 (1981). The denial of a proposed use is discretionary: A land use regulatory agency may properly reject a proposed use of real property, even though the proposed use is authorized under applicable zoning ordinances. *Wesley Investment Co. v. County of Alameda*, 151 Cal. App. 3d 672, 680 (1984). In fact, California's land use scheme encourages an approach which does not result in final determinations of allowable uses:

"[A] substantial amount of vagueness is permitted in California zoning ordinances: 'In California, the most general zoning standards are usually deemed sufficient. 'The standard is sufficient if the administrative body is required to make its decision in accord with the general health, safety, and welfare standard. . . . California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the community's zoning business is to be done without paralyzing the legislative process. . . . ' ' ' ' ' *Novi v. City of Pacifica*, 169 Cal. App. 3d 678, 682 (1985).

In such a scheme, where government entities are given broad discretion to apply vague standards, the denial of a proposed project or the denial of a variance request

will not preclude an owner from seeking approval of a different project which might afford the property owner some viable economic use of the property. The circumstances of amicus Gyler demonstrate this point. Therefore, even repeated discretionary denials could not be characterized as a final, conclusive determination that the property owner is permanently denied all reasonable beneficial use of his or her property. Under the rule utilized by the court below, a land use regulatory entity which repeatedly rejected any requested use of a property could avoid liability for the taking of property simply by not foreclosing the consideration of some other development proposal at some future date.

The holding of the court below does not follow from this Court's decision in *Williamson County*. That decision was phrased in terms of ripeness. "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 105 S. Ct. at 3117. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court stated:

"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the

fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 148-49 (footnote omitted).

Cases like this one become ripe for judicial review once the government agency has reached a final decision that it will not approve the project proposed by the property owner. At that point the administrative decision process has been completed, the loss to the property owner has occurred, and the decision's effect can be felt in a concrete way. *See Williamson County*, 105 S. Ct. at 3120-21. Furthermore, after a final decision has been reached with respect to the proposed project, judicial review will not result in the court's becoming entangled in a dispute over policy. The court will be squarely confronted with the issue of whether the application of the policy promoted by the regulation in question has resulted in a taking of property for which just compensation must be paid.

II

A REASONABLE AND LEGITIMATE EXPECTATION OF A PROPERTY OWNER TO MAKE A PARTICULAR USE OF HIS OR HER PROPERTY IS A PROPERTY INTEREST PROTECTED BY THE JUST COMPENSATION CLAUSE

Under the rule utilized by the District Court of Appeal, a property owner would be entitled to compensation only in those situations in which regulation has deprived the owner of all interest in property with the exception of bare title. The decisions of this Court establish, however, that a property owner may be entitled to compensation in

cases in which the government action takes an interest in property which is significantly less than the fee. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (even if government takes only an easement compensation must be paid); *Dugan v. Rank*, 372 U.S. 609, 625-26 (1963) (taking only of water rights which are part and parcel of the land); *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962) (interference with residential use), *see also San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 651 (1981) (Brennan, J., dissenting) (regulatory takings are essentially similar to other takings). The facts that "enjoyment and use of the land are not completely destroyed" and that "[s]ome value would remain" are not controlling. *United States v. Causby*, 328 U.S. 256, 262 (1946). The question becomes "whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Although it is well established that some land use regulatory actions may give rise to a claim for a taking of private property, this Court has "never precisely defined those circumstances." *United States v. Riverside Bayview Homes, Inc.*, 54 U.S.L.W. 4027, 4028 (Dec. 4, 1985). The facts of this case present an excellent opportunity for defining the constitutional analysis for determining when a land use regulation may violate the Just Compensation Clause.

The beginning of an analysis to identify a property interest protected by the Just Compensation Clause is the recognition that the Fifth Amendment does not protect the land itself. The "private property" protected by the

Constitution is the personal interests of the owner in his or her land. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). In our modern society the owner's interest in bare title is often negligible. Mere ownership of land without an expectation of use is most often a liability and not a benefit. Direct financial liability of ownership of the land in this case from 1974 to 1977 exceeded \$100,000 for taxes and assessments alone. JA at 14. Therefore, the true property interest is measured by the owner's reasonable expectation of use. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto*, 458 U.S. at 435, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). However, a property owner's expectations of use may range from wishful ideas to firmly established present uses. To determine in each case when a reasonable expectation of use has ripened into a protected property interest it is necessary to balance the governmental interests and the private interests at stake in the case. "This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-back expectations." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). This balancing of interests is the one approach recognized by this Court to serve directly the purpose of the Just Compensation Clause to ensure that it does not result from government action that " 'some people alone . . . bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.*, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In the context of the Due Process Clause it has long been recognized that an individual will be found to have a property interest in a benefit if he or she has "a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Such a "claim of entitlement" can be created expressly by statute, *id.* at 561, or implied by government action. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). Reasoning similar to that found in due process jurisprudence has been utilized by this Court in cases involving the Just Compensation Clause. *Ruckelshaus v. Monsanto Co.*, 467 U.S. —, 104 S. Ct. 2862 (1984), one of the more recent decisions of this Court applying the Just Compensation Clause, is an example of such a case.

In *Ruckelshaus* the Court was faced with the question of whether the data disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act violated the Just Compensation Clause. A manufacturer alleged that the disclosure of data by the Environmental Protection Agency (EPA) constituted a taking of property without the payment of just compensation in violation of the Fifth Amendment. The Court determined that the manufacturer did have a property interest protected by the Constitution in the data supplied to EPA. *Id.* at 2874. The Court based this conclusion on a consideration of whether under the circumstances of that case, the manufacturer had a legitimate expectation that its data would be kept confidential when submitted to the EPA. *Id.* at 2876-78. The Court concluded that for the period from 1972 to 1978, the manufacturer did have such an expectation which resulted from an explicit guarantee by the federal government that data provided by the manufacturer would be

kept confidential. Therefore, the manufacturer was entitled to compensation for the taking resulting from the disclosure or use of the data. *Id.* at 2879. Although the Court recognized that some "restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community,'" *id.* at 2875, quoting *Andrus v. Allard*, 444 U.S. 51 (1979), those restrictions are limited when a protected property interest arises from "the expectation of the submitter." *Id.* at 2879 n.17.

The reasoning in *Ruckelshaus* is fully applicable to the land use regulatory taking cases. A property owner has a protected interest in the ability to use his or her property, *United States v. General Motors Corp.*, 323 U.S. at 378, which interest is given up only to a limited extent as a burden borne in exchange for "the advantage of living and doing business in a civilized community." *Andrus v. Allard*, 444 U.S. at 67. "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited . . ." *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). The question is whether the facts of the case give rise to an interest "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978).

The determination of whether a property owner has a legitimate expectation to put his or her property to a particular use will depend upon the facts of each case. *See id.* at 124. This Court has stated that the "general

approach" to identify when a regulatory action gives rise to a claim under the Just Compensation Clause involves the consideration of two factors: "legitimate state interests" and "economically viable use" of the land. *Riverside Bayview Homes*, 54 U.S.L.W. at 4028, quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Other cases have described these factors as the economic impact of the regulation on the property, *see Penn Central*, 438 U.S. at 124; *Pruneyard*, 447 U.S. at 83, the governmental treatment given the particular property in question and other similarly situated property, *see Penn Central*, 438 U.S. at 139-40 (Rehnquist, J., dissenting), the government's asserted interest in preventing the proposed use, *see Pruneyard*, 447 U.S. at 85, the character of the government action, *id.* at 83, and the benefit afforded the property owner by government regulation of other property. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In effect, the analysis requires a balancing of the basis for the owner's expectation of use against the basis for the government's decision not to allow that use. This balancing test is particularly appropriate for focusing the inquiry on whether the governmental action is actually "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124, or is serving another unworthy purpose. As noted in *Armstrong, supra*, this beneficial objective is not served when a regulatory action distorts the balance so as to cause one property owner to bear a disproportionate share of the public burdens. The balance between the governmental interest in denying a requested use and the owner's basis for his or her expectation of use is a measure of the

fairness of the decision in distributing the benefits and burdens of land use regulation.

Application of this analysis to this case establishes that the appellant, MacDonald, Sommer & Frates (Partnership), has at a minimum stated a prima facie cause of action. At the time the property was acquired it was zoned by the County for residential use. JA at 44, Paragraph No. 8. The use as proposed complied with all limitations on use established before the project was submitted. JA at 44, Paragraph No. 8. The property was placed in an assessment district by the County in anticipation that the property would be developed for residential use. JA at 47, Paragraph No. 16. Since the date of acquisition, the Partnership paid approximately \$75,000 to the assessment district in anticipation that the property would be developed for residential use. JA at 48, Paragraph No. 19. The City of Davis (City) acting on behalf of itself and the County represented to the state and federal governments, in an effort to obtain grants to make sewer improvements, that the property would be developed for residential use. JA at 47, Paragraph No. 16. The County and the City have allowed property similarly situated to that of the Partnership to be developed for residential use. JA at 49-50, Paragraph No. 21. The economic impact of the decision to deny the Partnership the proposed use is to deny the Partnership any return on its investment. JA at 45, Paragraph No. 11.

Weighed against these considerations is the asserted governmental interest in denying the Partnership's proposed use: the preservation of agricultural land. JA

at 49-50, Paragraph No. 21. Although this government interest is more than a discretionary preference, on the facts of the case it is little more than a cover for the City's real motivation. The property is not suitable for agricultural use, a fact acknowledged by the County. JA at 51, Paragraph No. 24. The City did not designate the property for agricultural preserve until *after* the Partnership had applied to the County to develop the property. JA at 49-50, Paragraph No. 21. Furthermore, the County, the government entity with principal land use regulatory authority over the property, has not changed the classification of the property. The County continues to designate the property in its general plan and zoning for residential use. JA at 123.

Weighing these factors, it is clear that the Partnership has sufficiently pleaded that it possessed a legitimate expectation that it would be allowed to use the property as proposed so as to raise a claim under the Just Compensation Clause. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. If government acts without a clear health or safety need to interfere with the "claims upon which people [have relied]" it is only just and fair that the public as a whole bear a fair share of the burden of the cost of that interference.

III

**COMPENSATION OF INDIVIDUALS WHOSE
LEGITIMATE EXPECTATIONS OF PROPERTY
USE HAVE BEEN DESTROYED WILL AID NOT
HINDER EFFICIENT LAND USE PLANNING**

As an exercise of the police power, land use regulation must be enacted to promote the health, safety, and welfare of a community. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962). The government's interest in regulating the use of land, however, must be balanced against the need of a property owner to rely on the law relating to his or her property in order that he or she may plan his or her own affairs. *See Board of Regents v. Roth*, 408 U.S. at 577. If land use planners are given unbridled discretion to apply vague standards, as is the case in California, *see Novi v. City of Pacifica*, 169 Cal. App. 3d at 678, there is no motivation to limit their discretion by developing objective standards for the development of a community on which both government and property owners can rely.

It is the opinion of amici, including the Local Government Review Board, that governmental liability for the unjustified denial of legitimate expectations of land use will promote not hinder effective land use regulation. The result will be to discourage actions inconsistent with good public policy, such as erratic application of vague standards or the use of regulation to achieve results which in all fairness should require condemnation of property interests and compensation of the owner. At the same time the public welfare will be promoted by the encouragement of objective and consistent land use decision making.

The "various policy considerations" argued to oppose monetary damages as an appropriate remedy when property is "taken" by an exercise of the police power essentially concern preserving local government's discretion in land use planning and protecting local government's treasuries. *See Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-76 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). These considerations do not justify the circumvention of a constitutionally guaranteed right. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 660-61 (Brennan, J., dissenting). Furthermore, a rule establishing the financial liability of a local government that takes property through the use of the police power may lead to more efficient and objective land use planning. *See id.* at 661 n.26. Given a workable test for determining when a regulatory taking may occur, liability for constitutional violations by land use regulation should no more inhibit effective, objective decision making than does liability for any other form of government action.

The possible adverse economic effect on local governments resulting from the identification of protected land use interests is frequently overstated. In a regulatory taking context the owner does not lose the value of the property with the proposed use in place. He or she loses only the value of the expectation of such use. The measure of damages is the market value of the property before the specific proposed use was finally denied as compared to the market value of the property after the proposed specific use was denied. *Dugan v. Rank*, 372 U.S. at 624-25. In many circumstances, this standard measure of damages would mean little or no liability for a municipality

even where a protected interest in a specific land use had been destroyed. Certainly, if, as the City and County contend in this case, *see* JA at 123; Motion to Dismiss Appeal at 10-11, the denial of the specific proposed use leaves open the possibility of reasonable similar uses, the market value of the property after the denial will continue to reflect the expectation of those alternative uses and will approximate the value before the denial. Similarly, if the landowner had proposed a use objectively unreasonable under the circumstances, the market value before the denial would not have reflected much possibility of approval and would not change significantly after that use was denied.

The only circumstances where it is fair to say that significant damages are likely to result are those cases where the market objectively placed a high value on the expectation of approval of the proposed use before the action was taken *and* as a result of the action taken the market objectively places a low value on the expectation that any reasonable use of similar value will be allowed.

For these reasons, significant liability is unlikely to result from land use decisions in communities which adopt rational and objective plans and zoning standards and enforce those standards in a consistent and neutral way. In such circumstances the market value of the property will reflect the uses reasonably consistent with the community's planning criteria and zoning standards. Therefore, as long as the decisions of the municipality on proposed uses continue to be reasonably consistent with the established planning criteria and zoning standards, such decisions would not significantly change the market value of the properties involved.

Liability is most likely to arise where the planning process is being implemented in a manner inconsistent with objective and systematic land use management, where use designations are manipulated on an ad hoc basis, where previous planning criteria or zoning standards are ignored or modified after proposed uses are submitted. In other words, liability is likely to be found only in those circumstances where it would reward reasonable and responsible property owners who are victimized by arbitrary or capricious regulatory practices.

Consistent application of the legitimate expectation analysis to land use decisions will provide motivation for the development of land use regulations on which all parties can rely. Determining the occurrence of a regulatory taking by balancing the basis of the owners' expectation of use against the basis for the government's denial will equalize the burden of land use regulation. All parties will be encouraged to introduce a greater degree of certainty to the land use planning process, which in turn will encourage effective and objective land use regulation with due respect for constitutionally protected property interests.

CONCLUSION

The decision of the District Court of Appeal in this case was erroneous because it applied a standard unsupported by the precedents of this Court. A property owner may state a claim for a taking by establishing that a reasonable expectation of use has been denied by a final decision which is not based on a significant health or safety

need. Since appellant has pleaded facts sufficient to establish a legitimate expectation of use the decision of the Court of Appeal of the State of California, Third Appellate District, should be reversed.

Respectfully submitted,

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BRIEF

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In the Supreme Court of the United States

October Term, 1984

MacDONALD, SOMMER & FRATES, a partnership,

Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,

Appellees.

ON APPEAL FROM THE
COURT OF APPEAL OF CALIFORNIA

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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LAKE NACIMIENTO RANCH CO.;
GOLDRICH, KEST & STERN;
AND PALMER DEVELOPMENT CO.

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THE COUNTY OF YOLO and THE CITY OF DAVIS,

Appellees.

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

With the consent of the parties (whose letters of consent have been filed with the Clerk), this Brief of Amici Curiae is filed on behalf of:

- First English Evangelical Lutheran Church of Glendale, California;
- Hollister Ranch Owners Association;
- Eva Kollsman and City National Bank, as Special Administrators of the Estate of Paul Kollsman, deceased;

- Lake Nacimiento Ranch Co.;
- Goldrich, Kest & Stern; and
- Palmer Development Co.

INTEREST OF AMICI CURIAE AND SUMMARY OF THE PROBLEM

This Court has granted plenary review in this case in order to determine what kind of land use regulatory action can result in a taking of property and, when such a taking is found, what the appropriate remedy is for this Constitutional violation.

Case law developed by this Court, the U.S. Claims Court, numerous U.S. Courts of Appeals, and a growing number of state Supreme Courts recognizes that excessively restrictive land use regulation can violate the taking clause of the Constitution and that just compensation is an appropriate remedy for that Constitutional wrong.

California, by contrast, has developed a rule that just compensation can *never* be awarded for the adverse impact of land use regulations, regardless of how devastating the effect may be. California permits only invalidation of the regulation as a remedy. (*Agins v. City of Tiburon* [1979] 24 Cal 3d 266, *aff'd* on other grounds [1980] 447 US 225) The California remedy is illusory. Not only does it *not* right the Constitutional wrong, it is virtually never granted.

The problems faced by these Amici Curiae are as varied as the ways in which people and governmental land use planners interact. The common thread which unites them is that all of them have been subjected to aggressive regulation which has destroyed their ability to put their property to economically viable use.

The actions have all been by state and local government agencies in California, emboldened by the California judiciary's tradition of upholding virtually any regulation dreamed up by the facile minds of California planning officials. In the rare case when such agencies so overstep the bounds that something must be done, California courts grant "relief" in name only without substantive impact.¹

The regulations faced by these Amici Curiae run a gamut from outright prohibition of use (First English Evangelical Lutheran Church of Glendale, California),² to down-zoning property either to unproductive open space (Lake Nacimiento Ranch Co.) or to an uneconomic residential classification (Goldrich, Kest & Stern), to devising a density formula for development of hillside land which permits only 9 residential lots on 85 acres (Eva Kollsman and City National Bank), to imposition of unrelated monetary exactions on permission to build single homes on 100 acre parcels (Hollister Ranch Owners Association),³ to refusal to issue a development

¹In a recent candid commentary by two experienced land use attorneys who most often represent government agencies, California's treatment of property owners was described as follows:

"What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?" (Babcock & Siemon, *The Zoning Game Revisited* [1985] 257; emphasis in original.)

²On October 17, 1985, the California Supreme Court denied review in *First English Evangelical Lutheran Church v. County of Los Angeles*, No. B003702. An appeal to this Court is being prepared and will be timely filed.

³See *Remmenga v. California Coastal Com.*, (1985) 163 Cal App 3d 623, app. dismissed, No. 85-159 [the Chief Justice and Justices Brennan and Rehnquist would have noted prob. jur.].

permit which was mandated by statute (Palmer Development Co.).

As may be seen from these examples, the problems created in California by stringent regulations affect a variety of people in a multitude of situations.

And no relief is forthcoming from the California courts.

Moreover, the refusal of the California courts to accept the growing body of Federal case law which acknowledges the Constitutional propriety of a damages remedy has created a procedural problem which aggravates the already onerous substantive problems facing the property owners. The problem is: where does one bring suit? While not the most pressing problem created by California's non-compensation rule, it takes a heavy toll in terms of court time, energy, expense, and redundant litigation. The problem could be ended by compelling California to recognize the utility of compensation as an acceptable remedy for regulatory takings. Under the present system, the following have occurred:

- Two of these Amici (the Lutheran Church and a member of the Hollister Ranch Owners Association) filed suit in California courts. They were accorded no relief. Their claims under *Federal* law were dismissed as a matter of *California* law.⁴
- Two other Amici (the Kollsman Estate and Lake Nacimiento Ranch Co.) filed suit in U.S. District Court. A judgment in Kollsman's favor (*Kollsman v. City of Los Angeles* [CD Cal

⁴This outlandish statement of affairs is exemplary of California's disdain for Federal law in this field. (See cases discussed at pp 20-26 herein.)

1983] 565 F Supp 1081) was vacated on appeal on the ground that the District Court should have abstained. (*Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830) Thus, the Kollsman Estate has been told to forget its seven years of Federal litigation⁵ and begin anew in California courts.

- Goldrich, Kest & Stern simultaneously filed suit in *both* State and Federal courts. Declaratory and injunctive relief were sought from the State court, while monetary relief was sought from the District Court.
- Palmer Development Co. filed suit in both State and Federal courts, seeking damages and injunctive relief from the State court and a compensatory remedy from the District Court.

Because California has not been overruled by this Court for its aberrant system of refusing to award compensation for regulatory takings of property, property owners are confronted with the "double whammy" of oppression by local government agencies and not knowing what jurisdiction to turn to for relief.⁶

⁵Mr. Kollsman, the original plaintiff, died during the protracted litigation. Whatever the eventual outcome, it will do him no personal good.

⁶Remarkably, after twice holding that California's non-compensation rule violates this Court's decisions (*In re Aircrash in Bali* [9th Cir 1982] 684 F 2d 1301, 1311, fn. 7; *Martino v. Santa Clara Valley County Water Dist.* [9th Cir 1983] 703 F 2d 1141, 1148), and in the teeth of the California Supreme Court's repeated refusals to change its mind, the Ninth Circuit Court of Appeals recently approved an abstention order on the ground that the California Supreme Court ought to be given another chance to clean up its act. (*Bank of America v. Summerland County Water Dist.* [9th Cir 1985] 767 F 2d 544, 547) Such solicitude is both unwarranted and unwise. No change will occur in California until this Court directly orders it.

These Amici Curiae pray that this Court put an end to California's errant treatment of property owners and compel protection of their rights in accord with the mandate of the Fifth and Fourteenth Amendments to the Constitution. Compelling California to enforce the protections granted by the U.S. Constitution will not only benefit property owners, it will eliminate costly litigation in multiple courts and obviate the need to bring most land use disputes to the attention of the U.S. District Courts. If California were compelled to acknowledge the Federal remedy of damages when that remedy is needed to right a Constitutional wrong, land use litigation would not need to occupy the time of the U.S. District Courts.

CALIFORNIA'S COURTS AFFORD NO PROTECTION TO THE RIGHTS OF PRIVATE PROPERTY OWNERS

While the cases involving these Amici run a gamut of land use restrictions ranging from outright prohibition of development, to down-zoning, to sophisticated formulae which prevent use, to exactions unrelated to the proposed use, to refusal to comply with statutory mandates, and *MacDonald, Sommer & Frates* deals with the refusal to allow subdivision of a 40-acre parcel, all are premised on the same philosophical quirk which has become the hallmark of California land use law:

California government agencies—both state and local—treat people who own property as though they have no rights. They are encouraged in this attitude by the California judiciary, which affords property owners no protection of their right to use their land.⁷

⁷Two astute observers recently concluded that "In California, the courts have elevated governmental arrogance to a fine art." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 253)

One wishes such a conclusion were merely an advocate's hyperbole. Sadly, it is not. It is amply verified by the scholarly assessments quoted at pp 17-19 in this Brief.

By decisions such as *HFH, Ltd. v. Superior Court* (1975) 15 Cal 3d 508 [no inverse condemnation cause of action for harsh regulation], *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal 3d 110 [general planning cannot constitute a taking of property], *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, aff'd on other grounds (1980) 447 US 225 [no right to compensation even if a regulation effects a taking], and *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal 3d 785 [there is almost no such thing as a vested right to use property], the California Supreme Court has told government agencies that they may enforce virtually any land use regulations they wish, and disregard individual rights⁸ which are fundamental to our society,⁹ without concern for judicial restraint. The California Courts of Appeal—as illustrated by the decisions in this case and other cases discussed in this brief—have enforced, built upon, and expanded this philosophy of disparaging the rights of property owners.

If, by chance, an agency so oversteps the bounds that minimal "relief" is granted (in the form of invalidation of the regulation many years after the damage has been done), California agencies know that such relief is illusory to the property owner and harmless to the

⁸More than a decade ago, this Court held that property rights are as much personal, civil rights as the right to speak or the right to travel. (*Lynch v. Household Fin. Corp.* [1972] 405 US 538, 552)

⁹As this Court aptly noted recently, "... the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner* [1984] ___ US ___, ___, 79 L. Ed 2d 343, 349)

agencies. In his four-Justice dissent in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, 655, fn 22, Justice Brennan quoted the advice of a prominent California city attorney (and author of a widely used California land use treatise) to his colleagues as follows:

" 'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

" 'If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

" 'See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.' Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations* (including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original)."

As exemplified by the case at bench, government agencies in California have received the message. They rest secure in the knowledge that property owners can be abused with impunity.¹⁰

¹⁰Justice Brennan cogently noted in *San Diego Gas & Elec. Co.* that California's sole "remedy" of invalidation provides no remedy for years of non-use and provides no incentive to government

While numerous Federal courts, as well as courts in other states, have read this Court's three opinions in *San Diego Gas & Elec. Co.* as expressing a view that California's treatment of property owners is Constitutionally unacceptable,¹¹ California continues its course unabated. It is apparent that there will be no change of that aberrant course without explicit direction from this Court. As one California Court of Appeal put it, until this Court *expressly holds* that the California Supreme Court's philosophy is invalid, that philosophy must be enforced by California's lower courts. (*Aptos Seascope Corp. v. County of Santa Cruz* [1982] 138 Cal App 3d 484, 494)

agencies to act otherwise. (450 US at 656) (See also Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* [1977] 86 Yale L.J. 385, 507-511.)

Under California's system, government agencies know they have nothing to lose by issuing use-stultifying regulations. Under no circumstances will California courts do more than order the offender to stop. And, as this case bears witness, even that minimal "relief" is rarely forthcoming. Indeed, one searches the reports of California cases in vain for any decision which invalidates zoning because it would be an unconstitutional taking. (See pp 15-16.)

¹¹See *Hernandez v. Lafayette* (5th Cir 1981) 643 F 2d 1188, 1199-1200; *Hamilton Bank v. Williamson County Reg. Plan. Comm'n* (6th Cir 1984) 729 F 2d 402, 408, rev's on other grounds sub nom. *Williamson County Reg. Plan. Comm'n v. Hamilton Bank* (1985) ___ U.S. ___, 87 L Ed 2d 126; *Barbian v. Panagis* (7th Cir 1982) 694 F 2d 476, 482, fn. 5; *Nemmers v. City of Dubuque* (8th Cir 1985) 764 F 2d 502, 505, fn 2; *In re Aircrash in Bali* (9th Cir 1982) 684 F 2d 1301, 1311, fn. 7; *Martino v. Santa Clara Valley County Water Dist.* (9th Cir 1983) 703 F 2d 1141, 1148; *Fountain v. Metro Atlanta Rapid Transit Auth.* (11th Cir 1982) 678 F 2d 1038, 1043; *Florida Rock Indus., Inc. v. U.S.* (Cl Ct 1985) 8 Cl Ct 160, ___, fn. 10; *Burrows v. Keene* (NH 1981) 432 A 2d 15, 20; *Pratt v. State* (Minn 1981) 309 NW 2d 767, 774; *Rippley v. Lincoln* (ND 1983) 330 NW 2d 505, 510; *Zinn v. State* (Wis 1983) 334 NW 2d 67, 72; *Anniceli v. South Kingston* (RI 1983) 463 A 2d 135, 140. But see *Citadel Corp. v. Puerto Rich Hwy. Auth.* (1st Cir 1982) 695 F 2d 31, 33, fn 4.

INVALIDATION—BY ITSELF—IS AN ILLUSORY REMEDY

California has concocted a remedy which sounds plausible when stated, but provides no relief in actuality: if an unconstitutional regulation is enacted, invalidate it. The remedy makes it *appear* that something has happened, and the judicial architects of this remedy may even *believe* they are supplying relief. But there is no remedy, and the relief has all the substance of smoke.

Tardy Closure of the Barn Door

Invalidation *can* only provide meaningful relief if a court reviews a regulatory act *before* the regulation adversely affects the individual rights of property owners. Moreover, invalidation in advance of regulation gives the regulating entity an appropriate option: it can either abandon the regulatory scheme before it inflicts injury or, if the ends are of sufficient importance, modify the regulation to provide for compensation.

However, if a court reviews a regulation *after* it has already had the effect of taking private property rights, invalidation—standing alone—is largely beside the point. The entity has *completed* a violation of the Constitutional protection against uncompensated takings, and serious damages have already been suffered. That violation is not cured when a court merely *informs* the entity of that fact. Only just compensation can cure the completed violation, and provide recompense for the damages.

Contrary to the California position established by *Agins*, a property owner who obtains compensation does not “. . . transmute an excessive use of the police power into a lawful taking . . .” (*Agins*, 24 Cal 3d at 273) He

merely recovers compensation for a taking which has already happened. It is the governmental entity which has, through an excessive use of the police power, itself created a situation in which a taking of property rights is a *fait accompli*. As this Court put it in *International Paper Co. v. U.S.* (1930) 282 US 399, 406:

“The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late.”

Invalidation after the fact—unaccompanied by *any* compensation—is little solace. As Professor Tribe recently noted in a discussion of this Court’s decision in *San Diego Gas*:

“On the merits, *Justice Brennan* concluded quite reasonably that, although nothing in the Compensation Clause empowers a court to compel the government to exercise its power of eminent domain where the regulatory ‘taking’ is temporary and reversible and the government would rather end the ‘taking’ than purchase the property, *the government must compensate* the property owner for whatever taking occurred between the enactment and the repeal of the offending regulation.” (Tribe, *Constitutional Choices* [1985] 385-386, fn. 23; emphasis added.)

To the same effect, though pre-dating *San Diego Gas*, are Hagman & Mischynski, *Windfalls For Wipeouts* (1978) 296-297; and Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977) 86 Yale L.J. 385, 507-511.

Games The Government Plays

Using mere invalidation as a remedy is an invitation to abuse. The major problem is that the only "relief" granted the property owner is the right to have the regulating entity draft a new regulation.¹² The courts cannot *direct* the entity to adopt any particular regulation. The upshot of this is that the property owner is at the mercy of the regulator. No less an authority than Richard Babcock, the acknowledged dean of the American land use bar, noted this problem nearly two decades ago:

"[I]f the Supreme Court of California were to say to the local legislature in Community X that its policy is improper that injunction, I suspect, would have little practical impact upon the identical administrative actions of Community Y or perhaps even on Community X itself. Other lawyers have shared the experience that follows a victory on behalf of a landowner in the state Supreme Court. You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend another two years and thousands of dollars litigating *that* classification." (Babcock, *The Zoning Game* [1966] 13; emphasis in original.)

¹²See, e.g., Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego* (1982) 57 Ind. L.J. 45, 51; Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations* (1982) 29 U.C.L.A.L. Rev. 711, 732-734.

In the two decades since Mr. Babcock wrote that, the only changes are that the length of time and use of court resources to litigate have lengthened and the cost has escalated. As Mr. Babcock reported in a current update of his book:

"One common practice, if the municipality lost the decision, was to rezone the property . . . and in effect invite [the property owner] to bring another lawsuit. If, for example, the plaintiff wanted C-commercial for property zoned single-family (R-1), the municipality would reclassify the land to duplex (R-2)." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 288)

See also *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, 655, fn. 22 (Brennan, J., dissenting and quoting advice given to California city attorneys that they can legally harass property owners in the manner noted).

Thus, the supposedly victorious property owner, who has succeeded in having a court invalidate an unconstitutional regulation, finds that his reward is an invitation to become a yo-yo. In response to the judgment, the entity simply enacts another unconstitutional regulation. The game can continue until the property owner exhausts his patience, his sanity, his wealth, or all three.¹³ Time is on the regulator's side.¹⁴

¹³A distressing, yet increasingly familiar pattern has developed wherein property is lost through foreclosure when planning delays disrupt the right to use the land to generate income. (See, e.g., *Jacobson v. Tahoe Reg. Plan. Agency* [9th Cir 1978] 566 F 2d 1353, 1366-1367; *Hollister Park Inv. Co. v. Goleta County Water Dist.* [1978] 82 Cal App 3d 290; *Orsetti v. Fremont* [1978] 80 Cal App 3d 961; *Frisco Land & Mining Co. v. State* [1977] 74 Cal

When the property owner finally succumbs, the entity—even though it has lost every judicial round—emerges victorious. Its “penalty” for having acted unconstitutionally is non-existent. The property owner’s relief is likewise.¹⁵

Plainly, this is a game a property owner cannot win. It is a game he should not have to play. It is so cynical and surreal that it puts the legal system into disrepute.

A Course Of Conduct Cannot Be “Invalidated”

Another problem with the invalidation remedy is that often the problem is not a discrete regulation, but a course of conduct, involving moratoria, delays, broken promises, unreasonable demands for “dedication” of property or “donation” of money in lieu thereof, chilling publicity, bad faith, and the like. (See, e.g., the case at bench; *Toso v. City of Santa Barbara* [1980] 101 Cal App 3d 934; *Jones v. People* [1978] 22 Cal 3d 144; *Briggs v. State* [1979] 98 Cal App 3d 190; *Eldridge v. City of Palo Alto* [1976] 57 Cal App 3d 613 [disapproved in *Agins* because it approved recovery of compensation].)¹⁶

App 3d 736, cert. denied [1978] 436 US 918. Cf. *County of Los Angeles v. Berk* [1980] 26 Cal 3d 201; *Klopping v. City of Whittier* [1972] 8 Cal 3d 39.

¹⁴Government goes on forever. However, as Keynes noted with considerable understatement, “In the long run, we’re all dead.” Mortals have to deal with that reality.

¹⁵See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls* (1983) 15 Rutgers L.J. 15, 69-70.

¹⁶For further discussion see Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law* (1975) 52 J. Urban L. 861, 886; Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations* (1982) 29 U.C.L.A.L. Rev. 711, 726.

Invalidation cannot be an appropriate remedy in these situations. How does one “invalidate” delay or unfavorable publicity or bad faith? How does one “invalidate” a course of conduct?

In such situations, something other than—or in addition to—invalidation must be available. Yet the California courts have plainly declared there is no other remedy.

A Comprehensive Guide To California Invalidation Cases

California is the most populous state in the Union. Its lands are among the most intensely regulated and its citizens do not shrink from engaging in litigation. If invalidation were a satisfactory remedy for abusive use of governmental regulatory power, it might be anticipated that the major problem in familiarizing oneself with the law would be one of selection, i.e., sorting through and choosing from the abundance of decisions in which land use regulations of California governmental entities have been invalidated on Constitutional grounds.

This anticipation would be wide of the mark. If a species of humor which ran rampant a number of years ago were revived, “A Comprehensive Guide to California Invalidation Cases” would qualify for inclusion in the library of the world’s shortest books. The last reported case in which a zoning ordinance was invalidated by a California court as confiscatory was decided *more than two decades ago*: *Hamer v. Town of Ross* (1963) 59 Cal 2d 776.

Thus, the hidden message in what the California Supreme Court is saying with its rule that invalidation is the only remedy for excessive regulation, is that there is no remedy at all. A generation has come of age since

the last zoning ordinance was struck down in California. That seems a sufficient length of time to conclude that the phrase "invalidation is the remedy" is a code for "there is no remedy."

The Reluctant Witness, Or "Don't Throw Me In That Briar Patch!"

There is one powerful, albeit reluctant, bit of testimony to the essential worthlessness of the invalidation remedy in California.

If this Court had the leisure to review the entire body of advocacy literature filed in California land use cases in recent years, one illuminating fact would stand out in bold relief. Attorneys who have appeared to defend the interests of property owners invariably dislike invalidation as a remedy. The more experienced the attorney, the greater is the dislike.¹⁷ On the other hand, the champions of invalidation as a meaningful remedy have been government attorneys who represent the very entities against whom this remedy is supposed to be efficacious. This is akin to wolves conducting classes for shepherds on how to protect their flocks.

Government lawyers have huckstered this "remedy" for the same reason counsel for property owners have in recent years adamantly opposed it. Both know it is

¹⁷This is not because property owners would rather get "just compensation" than use their land. Quite the contrary. It is because the problems facing property owners are made up (as noted earlier) of lengthy delays, unreasonable governmental conduct, a myriad of agencies from whom permits must be obtained, and the like. In these circumstances, invalidation *alone* simply doesn't work. (See Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law* [1975] 52 J. Urban L. 861, 885-887; Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 Institute on Planning, Zoning, and Eminent Domain [S.W. Legal Found. 1980] 177, 195.)

a sham. Not since Br'er Rabbit snookered his captors into prescribing a worthless punishment has sophistry been so rewarded.

The insistence of government lawyers that invalidation will teach their clients a lesson speaks eloquently for the emptiness of the "remedy."

CALIFORNIA'S HARSH IMPAIRMENT OF THE RIGHTS OF PRIVATE PROPERTY OWNERS AND ITS DISREGARD OF THIS COURT'S DECISIONS ARE MATTERS OF NATIONAL NOTORIETY WHICH MERIT THIS COURT'S ATTENTION

The harsh and aberrant treatment accorded private property owners in California (of which the case at bench is merely illustrative) is a matter of frequent discussion in textbooks and legal journals.

The following scholarly comments are typical:

"The *striking* feature of California zoning law is that the courts in that state have quite *consistently been far rougher* on the property rights of developers than those in *any other state*. In a fairly long series of cases, the California court has upheld restrictions on property rights which *would not be upheld in many other states, and (in some instances) probably not in any other*. Moreover, this group of decisions is not an isolated phenomenon, out of line with the rest; the same *spirit pervades the body of California zoning law generally*." (1 Williams, *American Land Planning Law* [1974] §6.03 at 115-116; emphasis added.)

"... this must also be recognized as another *striking example* of the *tendency* of the California court to go *well beyond* the position taken by other courts in upholding municipal requirements in the field of land use controls." (5 Williams, *American Land Planning Law* [Rev ed 1985] §156.07 at 357; emphasis added.)

"In the wide spectrum of holdings reached [in land use cases] in other jurisdictions, one of the *more restrictive and extreme* applications of the tandem theories [of vested rights and estoppel] has been by the California courts." (Kudo, *Nukolii: Private Development Rights and the Public Interest* [1984] 16 *The Urban Lawyer* 279, 287; emphasis added.)

"[Justice Brennan's] *San Diego* dissent strongly urged an application of the Holmes balancing of public need against private loss that more heavily favors the private landowner and focuses on the economic hardship caused by the *excessive* delay, *onerous* controls, and the *draconian* vested rights rules *prevailing in California*, where the case arose.

* * *

"Indeed, the Brennan *San Diego* dissent, in both tone and substance, can easily be read as a reaction against California's *strict* state and local land use regulations. It also may take into account the *inability* of private landowners to obtain *any sort of judicial relief* from instances of *undue* hardship, lengthy procedural delays, and California's *strict* vested property rights rules and virtual judicial dismissal of the Holmes opinion in *Pennsyl-*

vania Coal." (Callies, *The Taking Issue Revisited*, 37 *Land Use Law & Zoning Digest* 6, 7 [July, 1985]; emphasis added.)

"[Justice Brennan's *San Diego* dissent] is a chilling premonition for local government while a relief to landowners who have often gone *wholly without remedy in California* and elsewhere when *highly restrictive* government regulations have virtually *destroyed* land values even when the regulation itself is deemed and is held to be *illegal*." (Callies, *Land Use Controls: An Eclectic Summary for 1980-1981* [1981] 13 *The Urban Lawyer* 723, 725; emphasis added.)

"... anyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 251)

"What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?" (Babcock & Siemon, *The Zoning Game Revisited* [1985] 257; emphasis in original.)

"California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 293)

That California has disregarded this Court's land use teachings is demonstrated by Justice Brennan's *San Diego Gas & Elec. Co.* dissent. In Justice Brennan's words, "[The California] holding flatly contradicts clear precedents of this Court." (450 US at 647) Justice Brennan's canvassing of this Court's decisions speaks eloquently. A comparison of his conclusions with those of the California Supreme Court in *Agins v. City of Tiburon* (1979) 24 Cal 3d 266, aff'd on other grounds (1980) 447 US 255, does likewise:

Agins

"We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation." (24 Cal 3d at 269-270)

San Diego G & E

"Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.

"Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. [Citations.]" (450 US at 656)

Agins

"In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." (24 Cal 3d at 276-277)

"We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." (24 Cal 3d at 275)

Another clear point of California's departure from Constitutional protection is demonstrated by this Court's decision in *Owen v. City of Independence* (1980) 445 US 622. In addition to this Court's plain holding that a damages remedy is a "... vital component ..." of litigation to vindicate Constitutional rights (445 US at 651)—a holding expressly *not* followed in California, as noted above—the philosophy expressed by the

San Diego G & E

"But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. [Citation.]" (450 US at 660-661)

"The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a taking, and recover just compensation if it does so." (450 US at 660)

California Supreme Court is totally at odds with this Court's.

The California Supreme Court's rationale is based on its perception of the "needs of government." (*Agins*, 24 Cal 3d at 274) The California Court opined that "threat of unanticipated financial liability" through inverse condemnation "will intimidate legislative bodies" and land-use planners and present a "potential for fiscal chaos." (*Agins*, 24 Cal 3d at 276-277)

In *Owen*, this Court also considered the tension arising out of the increasingly common encounter between a citizen deprived of Constitutional rights and an entity with limited public funds at its disposal. But while the California Supreme Court enshrined the convenience of planners and the defusing of risk to the fisc as the values it found worthy of the highest protection (at the expense of individual rights), this Court reached *the opposite conclusion*. Pointedly repudiating the policy of the California court, this Court noted that it would be unjust to permit an entity "to disavow liability for the injury it has begotten. . . ." (445 US at 651) The threat of financial liability:

" . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." (445 US at 651-652)

The threat of financial liability arising from Constitutional infractions disturbed the California court, which noted in alarm that it might inhibit cities from exercising governmental powers. This Court concluded that inhibition based on Constitutional concerns is a very healthy thing.¹⁸ *Owen* encourages studied reflection

¹⁸After all, it is the public at large which enjoys the benefits of the government's activities," and thus "it is fairer to allocate

instead of impulsive, policy-based denial of Constitutional protection, and ratifies the "[e]lemental notion[] of fairness" that "[the party] who causes a loss should bear the loss." (445 US at 654)¹⁹

Thus, by both its holdings and its underlying philosophical rationale, the California Supreme Court has expressly taken a position which defies this Court's teaching.

Beyond this comparison of case holdings and review of scholarly commentary, however, is a revealing analysis from within the California system. In an article co-authored by a career research attorney (since 1969) for the California Supreme Court, which may provide some insight into the thinking of those who are on that Court, it is noted (with considerable understatement) that:

" . . . California law has taken a unique course, rendering decisions of other jurisdictions of little relevance to the California practitioner." (Willemsen & Phillips, *Down-Zoning and*

any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated." (445 US at 655)

¹⁹This concept is particularly apposite in land use law, since regulations generate both loss and benefit, and the public which enjoys the benefit can finance the concomitant loss. The essence of just compensation law is equity and fairness. (*United States v. Fuller* [1972] 409 US 488, 490) Its *raison d'être* is to protect citizens from government action which would have the effect of "forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." (*Armstrong v. United States* [1960] 364 US 40, 49) Full indemnification to effectuate "natural justice" is the *sine qua non* of the just compensation clause, and its language "should be liberally construed" to that end. (*Monongahela Nav. Co. v. United States* [1892] 148 US 312, 325, 328) All of this is ignored by the California Supreme Court in land use cases.

Exclusionary Zoning in California Law [1979]
31 Hastings L.J. 103, 104)

Later in the article, it is revealed that one of those "... other jurisdictions ..." whose decisions are deemed "... of little relevance ..." is the Federal judicial system:

"In rejecting the remedy of damages for inverse condemnation, California courts have charted a unique course. Their decisions, although resting on principles of fiscal policy and flexibility in planning, put California at odds with some of the federal courts, particularly the Northern District of California. Consequently landowners are likely to file future inverse condemnation actions in federal instead of state courts, thus forcing the federal courts to face the question of whether to follow *HFH* and *Agin* [i.e., California law] or to adhere to federal precedents." (31 Hastings L.J. at 121; footnotes omitted; emphasis added.)

The idea of "forcing" a "choice" between decisions of a state court and decisions of *this* Court and other Federal courts on issues of Federal Constitutional law is preposterous. One would have thought the issue settled no later than *Appomattox*.

The attitude of the California Supreme Court is evident in its treatment of simultaneous Petitions to review the Court of Appeal decisions in *Gilliland v. County of Los Angeles* (1981) 126 Cal App 3d 610 and *Gilliland v. City of Palmdale* (1981) 179 Cal Rptr 627. Both cases involved governmental denial of use of different parts of the same parcel of property. (Part of the property was within the city's jurisdiction, part within the county's.) Both cases were brought in state court seeking relief under 42 USC §1983. Decisions affirming

dismissal of the cases were issued almost simultaneously by two different Court of Appeal panels. The manner in which the appellate panels dealt with the cases was startlingly different:

- In the *County* case, the Court of Appeal said it would have to abide by the California Supreme Court's view of Federal Constitutional law, even if it was contrary to *this* Court's. (See 126 Cal App 3d at 617.)
- In the *Palmdale* case, by contrast, the Court of Appeal examined California law in light of the opinions issued by this Court in *San Diego Gas & Elec. Co.* and concluded that "*California's position flatly contradicts clear precedent of United States Supreme Court cases...*" (179 Cal Rptr at 631; emphasis added.)

The California Supreme Court simultaneously considered whether to review these two decisions. It declined review in both. However, in so doing, it ordered the *Palmdale* opinion deleted from the official reports, thus banishing the critical analysis and leaving as California's rule a holding that *even in Federal Civil Rights Act cases California will not follow Federal law.*²⁰

²⁰California's openly rebellious posture is of a type rarely seen in this Court since the demise of the "interposition" doctrine in *Cooper v. Aaron* (1958) 358 US 1, 18-19. This defiance of the Supremacy Clause is reminiscent of the famous "speech" by the trial judge in *Estes v. Texas* (1965) 381 US 532 (quoted in the Chief Justice's concurring opinion [381 US at 566] in which he proclaimed that his oath was to uphold the *state* constitution, rather than the *federal*).

While California may enforce its own Constitution in a manner which affords *more* protection to individuals than the U.S. Constitution, this Court has repeatedly held that it may not afford *less*. (See, e.g., *Prune Yard Shopping Center v. Robbins* [1980] 447 US 74, 81; *Mills v. Rogers* [1982] 457 US 291, 300.

California is part of this Nation. Its citizens deserve the same protection accorded citizens in other states. Such protection is wholly lacking when a California court can read out of the Constitution any significant protection for the rights of property owners. California's rule is contrary to this Court's settled teachings and the holdings of most other state Supreme Courts.

California has successfully thumbed its nose at this Court for too long. It has become a nationally acknowledged scandal which is rapidly growing more serious. It is time for this Court to call a halt.

**CALIFORNIA IS A FAILED EXPERIMENT
WHICH DEMONSTRATES BOTH THE IN-
EQUITY AND THE INEQUITY OF A SCHEME
WHICH REFUSES TO INCLUDE COMPEN-
SATION AS A REMEDY**

For some time now, California's citizens have been guinea pigs in an experiment which demonstrates the results of permitting Constitutional violations to be committed without affording substantive relief.

While painful to its California victims, the experience could be worthwhile in the long run if it serves to demonstrate to this Court that Constitutional rights *cannot* be fully protected if the "remedy" for their violation is severely circumscribed.²¹

California, as it has been operating for the last decade or two, would appear to represent the closest thing to

²¹To its credit, this Court has already held that:

"[a] damages remedy against the offending party is a *vital component* of any scheme for vindicating cherished constitutional guarantees." (*Owen v. City of Independence* [1980] 445 US 622, 650-651; emphasis added.)

nirvana attainable for planners and regulators²² and their legal apologists (sometimes self-described as "police power hawks"²³). In *Agins*, the California Supreme Court expressly adopted a policy that land use planners have unfettered power to "innovate" without fear of financial consequences, even if they destroy the rights of innocent citizens in the process of advancing what they perceive to be the greater public good:

"The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. . . . Community planners must be permitted the flexibility which their work requires. . . . '[The] threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe.' . . . In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation

²²Probably the only type of system to surpass it was described by Professor Callies after a visit to the Far East:

"China is a planners' paradise. There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. Once a plan is made, it is the law of the land . . ." (Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls* [1982] 14 *The Urban Lawyer* 781, 845)

²³See, e.g., Mandelker, *Land Use Law* (1982) p v.

remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." (24 Cal 3d at 275-277)

As a consequence, California planners have been "innovative" indeed. Realizing that the *only* consequence of a judicial determination of unconstitutionality will be a holding that they reconsider and perhaps adopt a different regulation, California planners have bent their most inventive efforts toward attempting to get something for nothing. They have:

- zoned vacant land for open space or park use only;²⁴
- conditioned office construction on provision of child care facilities, public art, jogging tracks, low income housing, and public transit;²⁵
- created "formulas" to determine the appropriate density for development which permitted virtually no development;²⁶

²⁴E.g., *Arastra Limited Partnership v. City of Palo Alto* (ND Cal 1975) 401 F Supp 962. As part of a settlement which paid the property owners \$7,500,000, the opinion was vacated. (See 417 F Supp 1125; Berwanger, *Recent Developments in Judicial Relief for Owners of Land Limited to Public Open Space* [1976] 52 L.A. Bar Jour. 196, 197, fn 4.)

²⁵See, e.g., San Francisco Downtown Plan, San Francisco Office/Housing Production program, San Francisco Transit Impact Development Fee Ordinance, Los Angeles Preliminary Transit Corridor Specific Plan, Monterey Ord. No. 2416 C.S., Santa Monica General Plan: Land Use and Circulation Elements.

²⁶E.g., *Kollsman v. City of Los Angeles* (CD Cal 1983) 565 F Supp 1081, vacated and remanded on abstention grounds (9th Cir 1984) 737 F 2d 830.

- exacted "dedication" of property or "donation" of fees in lieu thereof as conditions to the issuance of permits even when the conditions bore little or no relationship to the permits being sought.²⁷

In the course of implementing such "innovative" ideas, California planners have driven many California property owners into bankruptcy.²⁸

The upshot of all this is that, "In California, the courts have elevated governmental arrogance to an art form." (Babcock & Siemon, *The Zoning Game Revisited* [1985] 253.) Indeed, the concept has been given a whole new dimension. Planners and government officials act as though *they* own the land which the owner who paid for the land is seeking to use. When bureaucrats know there is no penalty—and a wrist slap by a court opinion which says they oughtn't have done something is not, by itself, an effective remedy—there is an irresistible impulse to run amok. The inmates take over the asylum.

California is now "... commonly regarded as the most restrictive state in the country with respect to the use of land ..." (Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls* [1983] 15 Rutgers L.J. 15, 70) There are no remedies for property owners whose rights have been trampled in California's dash to achieve this dubious honor. (See commentaries quoted at pp 17-19.)²⁹

²⁷E.g., *Remmenga v. California Coastal Com.* (1985) 163 Cal App 3d 623, app. dismissed, No. 85-159 [The Chief Justice and Justices Brennan and Rehnquist would have noted prob. jur.]; *Whaler's Village Club v. California Coastal Com.* (1985) 172 Cal App 3d 62.

²⁸See note 13 and accompanying text.

²⁹Professor Callies, in an outspoken moment, said "[w]e all know the California courts won't let landowners/developers build

In light of all that, an incredible—if strangely entitled—polemic has recently appeared under the authorship of three experienced land use lawyers and two professors of national repute. (Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto* [1984] 9 Vt. L. Rev. 193)

If it were authored by lesser lights, one might be tempted to ignore it. But, when authored by prominent land use practitioners and academics, and plainly intended to influence this Court to disregard the persuasive thrust of Justice Brennan's dissent in *San Diego Gas*, some word seems in order.

First. While the authors briefly identify themselves in an opening footnote, nowhere do they reveal their biases to those who aren't already in the know. The three private practitioners, overwhelmingly toil in government vineyards, only rarely representing private property owners.³⁰ Professor Mandelker authored the State of Hawaii's land use statutes. Professor Williams served for many years on the New York City Planning Commission and as Vice Chairman of a Regional Planning Board and member of a Board of Zoning Appeals in New Jersey.

This information is not presented to the reader of their article. Plainly, these are people whose interests and sympathies lie with the regulators.

The concealment is reminiscent of the ploy attempted by George Spater—then general counsel of American Airlines, later its president—who wrote an article on aircraft noise and identified himself only as a “member

anything! [Citations.]” (Callies, *Land Use Controls: An Eclectic Summary for 1980-1981* [1981] 13 Urban Lawyer 723, 724, fn. 6)

³⁰See the report of some of their more recent exploits in Babcock & Siemon, *The Zoning Game Revisited* (1985).

of the bar.”³¹ He suggested people accept noise as the price of progress. Time Magazine exposed Mr. Spater's bias. (Time, September 10, 1965, at 37-38) We hope this discussion will, in Justice Douglas' words, allow the Court to recognize that the “Manifesto” is no more than a brief by “. . . special pleaders who fail to disclose that they are not [acting as] scholars but rather people with axes to grind.”³² It is entitled to no more deference than any other brief by special interest groups.

Second. The article rails for more than fifty pages about how its authors don't like Justice Brennan's *San Diego Gas* analysis and how they think his proposed remedy, which includes the possibility of compensation, is unnecessary, wrong, and contrary to other decisions of this Court. Yet, notwithstanding its singular focus on the remedy issue, the article *never mentions even one* of this Court's decisions beginning in 1932 with *Hurley v. Kincaid* (1932) 285 US 95 and continuing through the decision last Term in *Ruckelshaus v. Monsanto Co.* (1984) ___ US ___, 81 L Ed 2d 815 holding that compensation is the *preferred* remedy.³³ Indeed, as this Court put it in *Ruckelshaus*, ___ US at ___, 81 L Ed 2d at 841:

“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for

³¹Spater, *Noise and the Law* (1965) 68 Mich. L. Rev. 1373.

³²Douglas, *Law Reviews and Full Disclosure* (1965) 40 Wash. L. Rev. 227, 228-229.

³³It *can't* be that they are not aware of these cases. At a minimum, they say they have read Professor Kanner's article (see 9 Vt. L. Rev. at 209, fn 53) which discusses most of them extensively. (Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty* 1980 Institute on Planning, Zoning and Eminent Domain [S.W. Legal Found. 1980] 177, 197-206)

compensation can be brought against the sovereign subsequent to the taking."³⁴

Third. While the article expresses the belief that planners will plan better without the fear of compensatory damage judgments looming over them, its authors ignore what they already know of the California experiment. As discussed earlier, freedom from control has produced abuse of power rather than sensitivity.

The sophistry which underlies the "Manifesto" is revealed by examining the comments quoted at pp 17-19 of this brief describing life in California under its current legal rules. Some of the more pungent descriptions come from three of the five "Manifesto" authors: Messrs. Babcock, Siemon, and Williams. *They* describe California land use law as:

- bizarre;
- lacking in due process;
- notorious for its extreme regulations;
- arrogant;
- containing rules which would not be upheld in *any* other state; and
- creating an atmosphere in which a property owner might just as well slit his throat as try to obtain justice.

And *that's* what they say they want for the rest of the country.

Nonsense.

³⁴The remedy issue is covered extensively in the Amici Curiae Brief filed on behalf of Lodestar, Co., et al. We do not intend to re-plough that ground here. But it is important to note that the "Manifesto" is long on bile and polemic and short on analysis of the pertinent case law.

It is time to recognize California's land use regime for the failed experiment it is. The rest of the nation can be spared. Ownership of private property can be saved. California's fling with an unfettered land use bureaucracy, free to inflict whatever "innovative" restrictions it wishes, has failed to benefit California and has abused persons who did nothing but own property.³⁵

To dogmatically refuse to permit *any* compensation bleeds the Constitutional protection of the rights of property owners of any meaning. As this Court held in *Owen*, the compensatory remedy must be present to give meaning to the Constitutional right. The use of compensation as a remedy in appropriate situations was reaffirmed earlier this Term in *US v. Riverside Bayview Homes, Inc.*, (1985) — US —

CONCLUSION

California's experimentation with the "invalidation only" remedy has proceeded far enough to paint a graphic picture for this Court of what the rest of the Nation ought to be protected against.

The audacious acts of California's planners—who feel unrestrained in the demands they place on private property owners only wanting to use their own property—should serve as a warning to this Court. Such over-zealous actions need to be curbed, not expanded.

³⁵In the "Manifesto," the authors acknowledge what *they* term "... a pervasive sin of municipalities ..." i.e., "... the practice ... of delay, delay, equivocation and never-ending 'negotiation' ... These actions are ubiquitous, vicious and devoid of any resemblance of procedural due process." (9 Vt. L. Rev. at 242)

The victims of such actions deserve *real* relief, not the palliative described in the "Manifesto."

To preserve the protection the Constitution intended for private property owners and to ensure that government planners heed individual rights while planning for the general public weal, these Amici pray that the judgment below be reversed and the California rule of non-compensability be consigned to its rightful resting place in historical oblivion.

Respectfully submitted,

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HOLLISTER RANCH OWNERS ASSN.;
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as Special Administrators of the Estate
of Paul Kollsman, deceased
LAKE NACIMINETO RANCH CO.;
GOLDRICH, KEST & STERN;
and PALMER DEVELOPMENT CO.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 18, 1985, I served the within *Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court One First Street, N.W. Washington, D.C. 20543 (Original and forty copies)	Edward R. MacDonald MacDonald & Teranishi 1140 Pitt School Road Suite B Dixon, California 95620
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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

AMICUS CURIAE

BRIEF

9
No. 84-2015

Supreme Court, U.S.

FILED

DEC 19 1985

JOSEPH E. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO AND THE CITY OF DAVIS,
Appellees.

On Appeal from the Court of Appeal of California,
Third Appellate District

BRIEF OF THE
CALIFORNIA BUILDING INDUSTRY ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether zoning restrictions by local governments, which deprive the owner of all or virtually all of the beneficial use of land, constitute a taking of appellant's property without just compensation in violation of the Just Compensation Clause of the Fifth Amendment which has been incorporated into the Fourteenth Amendment.

2. Whether the Fifth and Fourteenth Amendments require that a court afford a possible remedy in damages if the property owner alleges that a zoning decision constitutes an unconstitutional taking of his property which cannot be remedied by prospective, equitable relief.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-2015

MACDONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO AND THE CITY OF DAVIS,
Appellees.

On Appeal from the Court of Appeal of California,
Third Appellate District

**BRIEF OF THE
CALIFORNIA BUILDING INDUSTRY ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

INTEREST OF THE *AMICUS CURIAE*

The California Building Industry Association ("CBIA") is a federation of seven local associations of home builders and property developers which are located in the major urban areas of the State of California. CBIA represents 5,300 members within these organizations. The companies represented by CBIA build a majority of the new housing in California and also engage in other forms of light construction. In furthering the interests

of the building industry, CBIA collects and disseminates information on behalf of its members and represents the building industry generally before various public agencies, including state and federal courts.

The California Supreme Court has held that private landowners cannot employ the Just Compensation Clause of the Fifth Amendment as incorporated into the Fourteenth Amendment to obtain any relief when local governments engage in zoning regulation, even if the government's action deprives the owner of all or most of the beneficial use of his property.¹ The availability of the Just Compensation Clause as a shield against oppressive governmental land use regulation is of obvious importance to the CBIA and its members. Just as important is the ancillary issue of whether the only appropriate remedy for a "regulatory taking" effected through zoning laws is prospective, equitable relief or whether a monetary remedy is constitutionally compelled when past, uncompensated injury has been suffered. The availability of just compensation for the "takings" occasionally caused by land use regulation is very important to the financial health of home builders and developers who have lost the beneficial use of their property solely to serve local governmental interests such as maintaining an open space policy. The CBIA therefore wishes to present its views concerning the important legal issues raised in this case, and to urge the Court to reject the rulings of the California state courts which nullify the protections for the individual's property rights embodied in the Just Compensation Clause of the Fifth Amendment.²

¹ See *Agins v. City of Tiburon*, 24 Cal. 2d 266, 275 (1979), *aff'd* on other grounds, 447 U.S. 255 (1980); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508 (1975).

² Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

STATEMENT

1. In 1971, appellant, a partnership comprised of three individuals, purchased a forty-four acre parcel of land located within Yolo County, California ("County"), and in the immediate vicinity of the City of Davis, California ("City") (J.A. 7, 43). The County had zoned the property for residential use in 1966, and that zoning designation remained in effect at all times relevant to this litigation (J.A. 44). The property abuts other land that has been zoned and developed for residential use (J.A. 43-44).

Consistent with the County's zoning designation, the property is appropriate and suitable in terms of physical characteristics for residential development (J.A. 43-45, 116-117). By contrast, the property is absolutely unsuitable for agricultural uses (J.A. 45). The topsoil has been removed completely and the remaining soil is infested with pests that would make the growing of crops uneconomical, if not impossible (*ibid.*). Indeed, the County Board of Supervisors has expressly found the land to be impaired for agricultural use (J.A. 51).

In 1975, appellant applied to the County for approval of a subdivision map, a necessary first step in implementing appellant's plan to develop the property for residential use (J.A. 49). There is no dispute that appellant's application complied with all relevant laws and was consistent with applicable zoning ordinances and the County's General Plan (*ibid.*). Appellant's application also demonstrated its ability to provide public access, adequate water and sewer services and other necessary public utility services to the development, if the City, consistent with its past practices, approved the extension of such services to residents of the proposed development (J.A. 49).

Although the property is located outside the City's limits, the City from the outset actively opposed appellant's application before the County. To further its policy of discouraging further growth in the area where appel-

lant's property is located (J.A. 50), the City urged the County not to approve the proposed subdivision map. The City argued that the proposed residential use conflicted with the City's designation of the property as an "agricultural reserve" on the City's general plan (J.A. 49, 118).³ The effect of this designation would be to preserve the land in its present state as an open field buffer between previously developed areas at no cost to the City or County. Of greater importance to appellant, the effect of the City's designation, if implemented by the County, was to eliminate any beneficial use of the property.⁴

On June 14, 1977, the County denied appellant's application for residential development (J.A. 70). The County Board of Supervisors, in denying the application, stated that it had a policy against the piecemeal shifting of uses for individual property sites from agricultural to residential (J.A. 73). The County further explained that its decision not to allow development was based on the plan's inadequate provision of services, including streets, sewers, water, and police and fire protection. This finding was based solely upon the City's representation to the County Board that the City would deny appellant's requests for extensions of these services in order to ensure the maintenance of an open space area (J.A. 74).

³ Although the property is outside the boundaries of the City, California law authorizes cities to adopt a general plan for "any land outside its boundaries which . . . bears relation to its planning." Cal. Gov't Code § 65300 (Deering Supp. 1985). Cities may also adopt specific zoning ordinances for such land. Cal. Gov't. Code § 65859 (Deering Supp. 1985). These general plans and zoning ordinances for land outside the city's limits serve to indicate to potential purchasers of the land how the city plans to make use of the property if the city were to annex the area.

⁴ Appellant indicated at the trial court level that past farming efforts had failed to produce sufficient revenue to cover the taxes and assessments on the land. J.A. 14. Neither the City nor County disputed this assertion.

2. In December 1977, appellant filed the instant "inverse condemnation" lawsuit⁵ in the Superior Court of the State of California for the County of Yolo. In its amended complaint, appellant alleged, *inter alia*, that the City's and County's actions in restricting its property to agricultural use constituted a *de facto* taking of the property for a public purpose requiring just compensation (J.A. 42-61). The court granted appellee's demurrer to appellant's amended complaint and dismissed the lawsuit. (J.A. 99-112). With respect to appellant's taking claim, the court held that under California state law a *de facto* taking only exists if the local government either invades the property, interferes with the property's use and enjoyment by pre-condemnation activity or interferes with the property's use by construction of a public improvement (J.A. 106). Because appellants had failed to make any of these allegations, its "complaint fail[ed] to state a proper cause of action for inverse condemnation." *Ibid*.

The California Court of Appeal for the Third Appellate District affirmed (J.A. 115-126). The court held that controlling state court precedent "specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation" (J.A. 120).

The California Supreme Court denied appellant's request for a hearing. J.S. App. B-1.

SUMMARY OF ARGUMENT

I.

This Court in its landmark decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), held that the Just Compensation Clause of the Fifth Amendment serves

⁵ A lawsuit seeking a declaration that government has taken property without actually condemning it is described by California courts as an "inverse condemnation" action. *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980). See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 638 n.2 (1981).

as a direct restraint on the police power of governments. "[I]f regulation goes too far it will be recognized as a taking." 260 U.S. at 415. In the more than 60 years since *Pennsylvania Coal*, this Court has cited and quoted this language with approval in numerous decisions. See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). Respect for these precedents requires the Court to hold that land use planning, pursuant to the government's police powers, if it is too extreme, can constitute a "taking" of private property within the meaning of the Fifth Amendment.

Because this would be the Court's first decision holding that zoning restrictions can constitute a taking within the meaning of the Just Compensation Clause and because appellant's complaint was dismissed on the pleadings, it is neither necessary nor appropriate in this case for the Court to attempt to develop any comprehensive standards for determining what restrictive zoning actions by local governments rise to the level of a taking in the constitutional sense. The CBIA urges the Court at this time to adopt a general standard and to hold that the Just Compensation Clause of the Fifth Amendment is violated when a city or county adopts land use restrictions the effect of which will "completely deprive the owner of all or most of his interest in the property" in contravention of his reasonable expectations. 450 U.S. at 653 (Brennan, J., dissenting). Given the allegations in this case, that the County restricted appellant's property to a valueless agricultural use which was contrary to the County's own zoning designation for the property, it is clear that appellant's complaint should not have been dismissed.

II.

Because California courts do not recognize a cause of action for monetary compensation based on restrictive zoning decisions, the Court must decide whether the Just Compensation Clause mandates that such relief should be

available to appellant if it can prove on remand that the City and County have "taken" its land. If land use planning can properly amount to a "taking," then the plain language of the Fifth Amendment requires the landowner to receive just compensation when such a taking occurs and when prospective, equitable relief will not provide a full remedy for past injury. The Fifth Amendment embodies an absolute obligation to pay when the government takes property, no matter what method of taking is employed. See *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

Moreover, simple fairness, which is the essential purpose of the Just Compensation Clause, requires that *how* the government takes property should be irrelevant to the individual's right to compensation. Similarly situated property owners who have been deprived of the value of their property by government action designed to further the public interest should be similarly compensated. Only in this way is the government effectively stopped from requiring some individuals to bear burdens which should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The California Supreme Court's policy arguments for denying compensatory relief under the Just Compensation Clause, if a "taking" is established, are both irrelevant and inadequate to justify a blanket rule against just compensation for takings effected through the zoning process. See *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). First, mere cost to the government is not an appropriate consideration in determining what relief a court should afford to one whose constitutional rights have been infringed. *Watson v. City of Memphis*, 373 U.S. 526 (1963). Second, the argument that cost will impose a chilling effect upon the decision-making processes of government officials is wholly speculative and has routinely been rejected by this Court in other contexts. See e.g., *Owen v. City of Independence*, 445 U.S.

662 (1980). Third, subjecting land use planning to the restraints of the Just Compensation Clause is no more disruptive to such decisions than subjecting other government action to the strictures of the Due Process Clause or other constitutional requirements. "If a policeman must know the Constitution, then when not a planner?" *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661 n.26 (Brennan, J., dissenting).

Finally, and most importantly, the solution to the "chilling" problem is not to grant government absolute immunity from providing just compensation, but rather to set the standards for a taking so that they do not interfere with day-to-day planning activities. The CBIA's proposed test will interfere with very few zoning decisions; only those which are unduly restrictive and deprive property owners unjustly of the beneficial use of their land will be affected.

ARGUMENT

I. GOVERNMENTAL REGULATION THAT DEPRIVES THE INDIVIDUAL OF ALL OR VIRTUALLY ALL OF THE BENEFICIAL USE OF HIS PROPERTY CONSTITUTES A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. This Court Has Clearly Held That The Takings Clause Imposes Limitations On The States' Exercise Of Their Police Power

Since the adoption of the Fifth Amendment,⁶ the requirement that just compensation must be paid when government takes private property for a public purpose has been understood largely as an eminent domain provision.

⁶ The prohibition against the government taking private property without just compensation has been extended to the states through the due process clause of the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). For simplicity, we will discuss the issue in terms of the just compensation requirement.

See 1 Blackstone's Commentaries app. 305-306 (G. Tucker ed. 1803); *Kaiser-Aetna v. United States*, 444 U.S. 164, 176 (1979); *Chicago, B. & Q. Co. v. Chicago*, 166 U.S. 226 (1897). With the expansion of both state and federal regulation of private economic activities, however, the issue naturally arose whether governmental regulation in the public interest that deprived an individual of the use of his property, even though the government did not formally condemn that property, nevertheless constituted a "taking" within the meaning of the Fifth Amendment. Stated differently, the constitutional issue posed by state economic regulation was whether the Just Compensation Clause imposed restrictions not only upon the eminent domain authority of state and local governments, but also more broadly upon the government's exercise of its police powers.⁷

This fundamental issue was resolved in 1922 in the Court's landmark "takings" case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, where Justice Holmes, writing for the Court, stated with characteristic simplicity: "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking." 260 U.S. at 415 (emphasis added).⁸ Although some state courts have pro-

⁷ See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 49-53 (1983) (hereinafter "Bauman").

⁸ Although the Court in *Pennsylvania Coal* did not undertake an exhaustive analysis of the Just Compensation Clause, the holding is certainly consistent with the language of the Fifth Amendment. From the perspective of the property owner, it makes no difference whether the property is condemned, flooded or ordered by the government to remain in an existing, unprofitable state. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Chicago, R.I. & P.R. Co. v. United States*, 284 U.S. 80, 96 (1931); *United States v. Chandler-Dunbar*, 229 U.S. 52, 76 (1913).

posed interpreting this language not to involve the Just Compensation Clause of the Fifth Amendment,⁹ the opinion as a whole plainly indicates that "the Court contemplated that a regulation could cross the boundary surrounding valid police power exercise and become a Fifth Amendment 'taking.'" *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 650 n.16 (1981) (Brennan, J., dissenting). See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416 (discussing the prohibition against the government taking "a shorter cut than the constitutional way of paying for the change").

In the 60 years since *Pennsylvania Coal*, this Court has never retreated from the principle that the Just Compensation Clause is more than a limitation on the actual exercise of eminent domain power. For instance, the Court in *United States v. Causby*, 328 U.S. 256 (1946), held that military overflights constituted a taking of the plaintiff's chicken farm. In so doing, the Court assumed that the Just Compensation Clause is a limitation on the federal government's police powers. Otherwise, the absence of any effort by the United States formally to condemn the property would have ended the Court's analysis.¹⁰ See also *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177 (1871).

⁹ *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, cert. denied and appeal dismissed, 429 U.S. 990 (1976); *Agins v. City of Tiburon*, 24 Cal.3d at 274, 598 P.2d at 29.

¹⁰ The cases involving the government's physical invasion of the individual's property cannot be distinguished from takings based on land use regulation in terms of the language of the Fifth Amendment; both involve a *de facto* taking and restrict the exercise of the government's police power and not its eminent domain authority. Physical invasions of property, no matter how insignificant, however, constitute a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426. Other regulation of property, by contrast, must satisfy a threshold requirement of imposing a significant loss on the individual's property. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124.

More recently, the Court has repeatedly cited *Pennsylvania Coal* with approval. Indeed, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), the Court described *Pennsylvania Coal* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" See, e.g., *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2874 (1984); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser-Aetna v. United States*, 444 U.S. at 174. Moreover, the basic principle that regulation that goes "too far" gives rise to a taking claim has been assumed to be valid in a host of other cases decided by this Court. See, e.g., *Agins v. City of Tiburon*, 447 U.S. at 254-255; *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1955).

Given the clarity of the Court's ruling in *Pennsylvania Coal*, the decision's numerous progeny in this Court, and the extensive reliance on the rule in the lower federal courts,¹¹ it is simply too late in the day for the Court now to hold that the Just Compensation Clause is merely a limitation on the government's eminent domain authority and does not impose limits on the authority of state and local governments to employ their police powers. Respect for precedent thus compels the conclusion that, if the City's and the County's regulation of appellant's property in this case went "too far," then it was a "taking"

¹¹ Federal courts of appeals have consistently interpreted *Pennsylvania Coal* as indicating that the Just Compensation Clause restricts the police powers of local governments. See, e.g., *Benenson v. United States*, 547 F.2d 939 (Ct. Cl. 1977); *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), cert. denied, 104 S.Ct. 1596 (1984); *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984); *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981), *rev'd on other grounds*, 728 F.2d 876 (7th Cir.), cert. denied, 105 S.Ct. 130 (1984). Thus, any departure from *Pennsylvania Coal* would have significant effects on the law of land use generally.

within the meaning of the Fifth Amendment. See pages 14-16, *infra*.

B. Zoning Decisions Which Deprive A Property Owner Of All Or Virtually All Of The Beneficial Use Of Property Constitute A Taking

Because the Court has assumed for 60 years that excessive regulation can constitute a taking within the meaning of the Just Compensation Clause, it has had numerous occasions to attempt to define a regulatory taking. Nevertheless, the Court has not attempted "to develop any 'set formula'" for making this determination. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. Compare *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Kaiser-Aetna v. United States*, 444 U.S. at 175; *Andrus v. Alard*, 444 U.S. at 65.

The appropriate framework for analyzing the Just Compensation Clause in the context of land use planning derives from *Pennsylvania Coal*. There the Court held that "government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law," 260 U.S. at 413, but nevertheless made clear that, if regulation goes "too far," it is a taking. This Court in *City of Tiburon* also made clear that most land use restrictions, even if substantial, do not require just compensation. Local officials are free to act in the public interest without fear of serious challenge if they do not "extinguish a fundamental attribute of ownership." 447 U.S. at 262. As the Court has pointed out repeatedly, mere diminution in the value of the landowner's property or the loss of the property's best use is not compensable. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962); *Hadachuck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887).

CBIA recognizes that these rules are just as well settled by this Court's decisions as those adopted in *Pennsylvania Coal* and does not seek an expansive interpretation of the Just Compensation Clause that would significantly restrict state and local efforts to act in the public interest in making zoning decisions. Instead, CBIA urges the Court to adopt at this time the stringent, if general, standard suggested by Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 653 (emphasis added),¹² which is that government action becomes "a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property" and deprives him of his reasonable expectations in that property. See *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. General Motors*, 323 U.S. at 528. Although the standard is admittedly general, it would be premature to attempt to develop a more detailed approach in the first case holding that such causes of action are legally permissible.

While a broad range of discretion must be accorded the zoning process under the Just Compensation Clause, the Clause must also act as a limitation upon government when property's value is virtually destroyed and reasonable expectations of the owner frustrated. By clarifying that the Just Compensation Clause is a backstop for extreme or overly zealous governmental action, this approach will provide a meaningful deterrent to extreme and destructive land use regulation by local officials without imposing an undue burden on planners and other government officials. See Bauman, *supra*, at 46-47; See pages 20-26, *infra*.

¹² Justice Brennan dissented from the Court's holding that there was no final judgment in *San Diego* within the meaning of 28 U.S.C. § 1257. 450 U.S. at 646.

C. Appellant's Claim States A Cause Of Action Under The Standards Proposed For Determining When Regulatory Action Constitutes A Taking Within The Meaning Of The Fifth Amendment

In order to decide this case, it is not necessary for the Court to prescribe any more specific standards for determining a taking than those proposed by Justice Brennan and urged by CBIA here. The case was disposed of by the courts below on the pleadings because of the California Supreme Court's extreme rule that zoning decisions can never constitute a taking. Thus, no effort was made by those courts to determine whether the allegations were sufficient to state a claim for a taking under any available standards. If the land use decisions of the City and County alleged here do not give rise to a cause of action on the basis that appellant's property was taken *de facto* within the meaning of the Fifth Amendment, then the protection in the Just Compensation Clause against excessive land use regulation of private property is chimerical.

Reduced to its basics, appellant's complaint alleges that the City and County have restricted appellant's property to use for agricultural purposes, for which that property is utterly valueless. All of the topsoil has been removed from the property and even the County itself has recognized that the land is agriculturally impaired. The alleged effect of the County's zoning action was to deprive appellant of the beneficial use of its property.¹³

¹³ Appellant has contended that the reason for the zoning action was to further the City's open fields policy which is designed to reduce the concentration of housing in and around Davis, and therefore, any further requests for residential development would be futile. Accordingly, the "taking" issue is ripe for review. The City and County argued in their motion to dismiss (p. 10-11) that the County only rejected appellant's specific development proposal and that appellant could have submitted another plan "which eliminated the deficiencies in the plan submitted." The Court of Appeal indicated that requests for relief from the County would be futile. J.A. 119. Nevertheless, the reason for the County's action is a

This conclusion is reinforced by applying the factors identified by the Court in *Penn Central* as relevant to deciding when a taking occurs. 438 U.S. at 124. The reasonable expectations of appellant, which were based on the County's zoning designation and the past practices of the City with respect to the extension of services, have been completely destroyed under the allegations of the complaint. In addition, the economic value of this property if limited to agricultural uses allegedly is *de minimis*. Accordingly, the County's action constitutes a taking of appellant's property.

The proper disposition of this appeal does not require the Court to delineate the precise degree of interference with property rights which will trigger a holding that there has been a taking. The City and County do not appear to contend that agriculture is actually a beneficial use of this property or a use that anyone could reasonably have anticipated would become the exclusive allowable use for the property when it was purchased.¹⁴ Because the alleged deprivation caused by the County's refusal to allow the property to be developed as zoned in this case is total, appellant's complaint states a proper claim under the Just Compensation Clause. In sum, the Court should hold that a cause of action for a taking is properly stated when the landowner alleges that the local government has restricted the use of the property, contrary to its existing designated use, in a way that deprives the property

question of fact and therefore, appellant's allegation should be accepted as true for purposes of deciding whether the complaint stated a cause of action. See *Perdue v. Crocker Nat'l. Bank*, 33 Cal.3d 913, 922 (1985). The California demurrer procedure is, in this respect, identical to the practice under Fed. R. Civ. P. 12(b)(6). See *Conley v. Gibson*, 355 U.S. 42, 45-46 (1957).

¹⁴ The character of the City and County's action does not involve a physical intrusion into appellant's property. 438 U.S. at 124. But this factor is merely a sufficient not a necessary condition to finding a taking. *Ibid*.

of all or virtually all of its beneficial value and thereby destroys the reasonable expectations of the landowner.¹⁵

II. JUST COMPENSATION MUST BE AN AVAILABLE REMEDY WHEN A STATE OR LOCAL GOVERNMENT "TAKES" PRIVATE PROPERTY THROUGH LAND USE REGULATION

Ordinarily, it would be sufficient for the Court to hold that appellant's complaint was improperly dismissed for failure to state a "taking" within the meaning of the Fifth Amendment and to remand for further proceedings without undertaking to decide what relief might be appropriate if appellant proves an actual taking. That course, however, would be an empty gesture in this case. The California courts have held unambiguously that no cause of action will lie for monetary relief with respect to "regulatory" takings generally, and therefore, no further proceedings in state court are available with respect to appellant's claim for compensatory relief. *Agins v. City of Tiburon*, 24 Cal. 3d at 272. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 640-641 (Brennan, J., dissenting). Thus, this Court must decide whether some form of monetary relief is available to a property owner, such as appellant, who alleges that his land has been "taken" in the constitutional sense by a

¹⁵ Obviously, many factual issues will require resolution in order for appellant to establish a taking warranting any relief. If a trier of fact eventually finds that the County only denied appellant's specific proposal and would have entertained a modified proposal for residential development, then under this Court's decision in *Agins v. City of Tiburon*, 447 U.S. at 262-263, there was no taking because appellant still retains the fundamental attributes of ownership and can still make the best use of its land. On the other hand, if the policy of the County and City is to ensure that appellant's property remains available only for agricultural use as part of an open fields policy, and, if appellant can prove that the effect of that decision on appellant's land has been as alleged, then appellant's property has been taken within the meaning of the Fifth Amendment.

locality's land use decision and that he has suffered actual injury which could not be remedied by prospective equitable relief.

A. The Language and Purpose Of The Just Compensation Clause Require Monetary Compensation For Regulatory Takings

Once a court has decided that a government has taken private property for a public purpose, the language and purpose of the Fifth Amendment require that just compensation be ordered by a court in a lawsuit such as appellant's. The Fifth Amendment admits of no exceptions; it states unambiguously: "[n]or shall private property be taken . . . without just compensation." Based on the "self-executing character"¹⁶ of this language, this Court has long held in other takings contexts that a governmental taking triggers an absolute obligation by the governmental entity to compensate the injured property owner. *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Kirby Forest Industries, Inc. v. United States*, 104 S.Ct. 2187, 2194 (1984). The rule is the same whether the "taking" is effected by formal condemnation, by physical invasion or by other governmental action that destroys the value of the property. Compare *Kirby Forest Industries, Inc. v. United States*, *supra*, with *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962); and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). There is nothing in the Just Compensation Clause that would support carving out an exception for any particular form of taking.

The California Supreme Court's rule that some governmental "takings" do not require just compensation is particularly incongruous because money damages are unquestionably available to remedy violations of other con-

¹⁶ 6 J. Sackman, *Nichols' Law of Eminent Domain* § 25.41 (rev. 3d ed. 1980).

stitutional provisions. Yet the Takings Clause is the only provision which is expressly keyed to "just compensation." Thus, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971), the Court held:

Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). See also *Davis v. Passman*, 442 U.S. 228, 248 (1979). It simply cannot be the rule that violations of these provisions must routinely be remedied by monetary awards, but that a "taking" within the meaning of the Just Compensation Clause, with its express provision for compensation, is to be remedied solely by injunctive relief.

Requiring just compensation for all regulatory takings is also consistent with the obvious purpose of the Fifth Amendment, which is to prohibit governments from forcing a few individuals to bear the financial burden necessary to achieve a public purpose. See *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945). Simple fairness, which is the watchword of the Constitution's protection of private property from governmental intrusion, requires compensation for such takings, whatever their character or duration.¹⁷ See *Armstrong v.*

¹⁷ As Justice Brennan pointed out in *San Diego*, this Court has never distinguished between a permanent taking and a temporary taking. 450 U.S. at 157. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949); *United States v. Causby*, 328 U.S. at 258-259. It may be that temporary regulatory takings may cause some difficult proof problems on the issue of appropriate compensation, but only because the government is given the flexibility of not

United States, 364 U.S. 40, 49 (1960) (the fundamental taking issue is whether the restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness should be borne by the public as a whole"). The unfairness of any other rule can be readily illustrated by an example.¹⁸

Assume that a city in California has a particularly attractive view of the ocean and therefore the community decides to ensure that the view from one area in and around the city toward the ocean will remain unobstructed by any housing or commercial development. The city can condemn the property that lies between the city and the ocean and thereby retain it in its undeveloped

being compelled actually to condemn the property taken. Instead, the locality is allowed to withdraw the regulation and compensate only for past injury to the property owner arising directly from the owner's lost use of the property during the period when it was actually taken. 450 U.S. at 658-660.

Justice Stevens in his concurring opinion in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108, 3125-3127 (1985), argued that certain "harms" arising out of a regulatory taking situation are not compensable under the Just Compensation Clause. We agree that not all costs incurred by a property owner in connection with an unduly restrictive land use regulation are recoverable. Certainly, there is no right to attorneys fees under the Fifth Amendment. If, however, a locality has taken such extreme measures that it in effect "took" the individual's property even for a temporary period, it is difficult to understand why just compensation would not require recovery of at least a fair rental value of the property for the period the government deprived the owner of its beneficial use. But, in any event, appellant's complaint was dismissed on the pleadings, and thus, it is impossible to determine the precise nature of the "taking" or the government's reasons for its actions or what the County and City would do if this regulation has "gone too far." Therefore, none of the issues concerning a temporary taking requires resolution now.

¹⁸ Compare *Arnstra Limited Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), vacated by stip., 417 F. Supp. 1125 (1976).

state or it can, in effect, forbid the owner through the zoning process from developing the property in any way that might impair the view. The city's goal is unquestionably legitimate, *Agins v. City of Tiburon*, 447 U.S. at 261, and either approach will equally well serve the city's purpose. Moreover, both approaches will have virtually an identical effect on the landowner's interests.¹⁹ What seems perfectly clear is that fundamental fairness requires that the city's obligation to compensate for the loss the owner suffers should be the same in both cases. Accordingly, the plain meaning and purpose of the Just Compensation Clause merge in such cases to require compensation for this regulatory taking.

B. The California Supreme Court's Policy Arguments Do Not Justify Denying Compensation For Regulatory Takings

As the California Court of Appeal accurately noted, California's refusal to award any compensation for a taking achieved through excessive land use regulation is based solely on "policy reasons." J.A. 120. See *Agins v. City of Tiburon*, 24 Cal.3d at 275. Although the court in *Agins* argued that the potential liability arising from such suits could have a significant "chilling effect" on land use planning, *id.* at 276,²⁰ these "policy" considerations amount to little more than a judgment by the California Supreme Court that compliance with the commands of the Just Compensation Clause would be too "costly" for California's local governments. The argument is an unpersuasive basis for interpreting the Fifth Amendment for several reasons.

1. First, as Justice Brennan pointed out in his opinion in *San Diego*, the expense incurred by a governmental

¹⁹ For these purposes, we assume that the property has no existing valuable use except as developed beach front property.

²⁰ See *Selby Realty Co. v. City of Buenaventura*, 10 Cal.3d 110, 120, 514 P.2d 111, 117 (1973).

entity as a result of violating the Constitution should be irrelevant in deciding what the Constitution requires by way of remedy. 450 U.S. at 621. See *Watson v. City of Memphis*, 373 U.S. 526, 537-538 (1963); *Bivens v. Six Unknown Named Agents*, 403 U.S. at 395. In suits against governmental entities, this Court is not "a self-constituted guardian of the Treasur[ies]" of the several states. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1956). In deciding what the Fifth Amendment requires, there is simply no room for an argument based solely upon governmental expediency.

Moreover, the potential costs to localities from inverse condemnation actions is easily exaggerated. Once a taking is found, the restrictive zoning conduct should be enjoined. At that point, the local government is not obliged to condemn the property or to pay the full market value for it. *San Diego*, 450 U.S. at 658 (Brennan, J., dissenting). Instead, the locality can approve a beneficial use for the property and simply compensate the owner for the temporary loss. This remedy will provide just compensation within the meaning of the Fifth Amendment, and will grant significant flexibility to local governments in deciding how best to respond to taking claims based on their land use decisions. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 658-661 (Brennan, J., dissenting). In fact, monetary relief can be a less drastic remedy than invalidation if the challenged action is of particular importance to the government. By paying just compensation, the government can continue to pursue its regulatory program.

Second, the state court's argument is not strengthened by recasting it into the form of a "chilling effect" on the government's ability to govern. Any time government agencies, federal or state, face the prospect of having liability imposed upon them, arguments are always forthcoming that the potential cost of such lawsuits will have a significant inhibiting effect upon officials in carrying out their public responsibilities. Largely because of their

wholly speculative nature, these arguments have not fared well in this Court.

For instance, in *Owen v. City of Independence*, 445 U.S. 662 (1980), the Court held that municipalities have no good faith immunity from damage awards under 42 U.S.C. § 1983. The dissent forcefully argued that the absence of municipal immunity from damages might lead to "ruinous judgments" against "many local governments [that] lack the resources to withstand substantial unanticipated liability" *Owen*, 445 U.S. at 670 (Powell, J., dissenting). Nevertheless, over these objections, and despite the assertion that the threat of such liability would inhibit the exercise of local government authority, *id.* at 668-69, the Court found no basis for shielding the City from liability for violations of a plaintiff's constitutional rights. See *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackmun, J., dissenting) (subjecting states to suits in courts of another state despite claims that such suits could impose significant financial and administrative burdens); *Butz v. Economou*, 438 U.S. 478, 523-24 (1978) (Rehnquist, J., dissenting) (refusal to grant absolute immunity to federal officials even though fear of liability may chill exercise of legitimate authority); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 717 (Rehnquist, J., dissenting) (holding city subject to suit under 42 U.S.C. § 1983, over claim that the holding would upset settled assumptions underlying "innumerable municipal insurance policies and indemnity ordinances"); cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978) (interpreting the antitrust laws as applying to local governmental entities, subjecting them to potential treble damage claims); *Milliken v. Bradley*, 433 U.S. 267 (1977) (ordering state to contribute approximately six million dollars towards costs of desegregation decree); *Johnson v. State of California*, 69 Cal. 2d 782, 792-793, 447 P.2d 352 (1968)

(rejecting "chilling" argument in a different civil rights context).²¹

The reason for the Court's general skepticism toward these assertions of harm is readily discernible.²² "[A]s an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc." *Owen v. City of Independence*, 445 U.S. at 656. Even though the government's potential liability under the Just Compensation Clause may not be clearly measurable, there is no reason to assume that the validity of the states' and localities' "Chicken Little" plea is inherently more substantial in the context of regulatory

²¹ In *Hutto v. Finney*, the Court affirmed a substantial award of attorney's fees against the Arkansas Department of Corrections over the State's claim of Eleventh Amendment immunity against such an award. 437 U.S. 678 (1978); see, *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974) (federal court remedial power limited to prospective injunctive relief; Eleventh Amendment prohibits award of retroactive damages). The dissent noted the possible dire financial consequences of such "unbudgeted disbursements" as the attorney's fee award and suggested that the "substantial" impact of such a monetary award warranted the imposition of immunity to protect the state. The Court, however, rejected this argument and held that "the distinction [in *Edelman*] did not immunize the states from their obligation to obey costly federal-court orders." *Hutto*, 437 U.S. at 690.

²² All damages judgments presumably carry some deterrent effect. However, assuming that the conduct for which damages are awarded was "wrongful," such deterrence is neither undesirable nor unwarranted. As one commentator has pointed out: "Fear of extensive liability indicates that the municipal planners may indeed be violating constitutionally protected property rights to a substantial degree." Comment, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. Rev. 711, 730 (1982) (hereinafter "UCLA Comment").

takings than in the host of other areas of the law where this argument has been implicitly or explicitly rejected by this Court. See UCLA Comment at 730 & n.113 (noting the absolute lack of evidence that liability under the Just Compensation Clause will materially affect land use decisions).

Indeed, the argument for immunity from damage actions rings particularly hollow in the context of claims arising under the Just Compensation Clause for regulatory takings. In the first place, even if zoning decisions were not subject to challenges under the Just Compensation Clause, they are still subject to due process challenges. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Thus, local officials still must make their land use decisions facing the prospect of suits based on a due process theory against the local government for damages under 42 U.S.C. § 1983. See Bley, *Use of the Civil Rights Acts to Recover Damages for Undue Interference with the Use of Land*, 1984 Proceedings of the Inst. on Planning, Zoning and Eminent Domain, ch. 7 at 7-5 n.4 (1985). Moreover, as appellant's brief fully documents, many states allow inverse condemnation claims as a matter of state law. Imposing an additional federal law method of obtaining compensation for such takings would not materially affect government officials in those states.

Moreover, the nature of the decision being made by zoning boards or other land use planners makes it unreasonable to provide extraordinary protection for their conduct which is not extended to decisions by other public officers. As Justice Brennan succinctly asked in *San Diego*, "if a policeman must know the Constitution, then why not a planner?" 450 U.S. at 661 n.26. Decisions by a municipal planner to pursue a policy such as "open

space" or to change a zoning designation to the obvious detriment of a landowner ordinarily are the product of a studied, deliberate choice to treat property in a particular way.²³ In such circumstances, it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). Indeed, it may be that the availability of just compensation for a regulatory taking might "encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts." *San Diego*, 450 U.S. at 661 n.26. See *Owen v. City of Independence*, 445 U.S. at 651-652, 656.

2. The real answer to the problem that liability may chill legitimate governmental action does not lie in holding that all land use decisions by all government officials must be immune from just compensatory relief. Instead, the solution lies in adopting sufficiently clear and stringent standards for imposing liability that municipal officers are not required to guess as to whether their conduct may be unconstitutional or to face a possible lawsuit arising out of every official act. Although it may not be possible to set out a clear litmus test for deciding what governmental

²³ Two other factors unique to land use planning make it incongruous to single out such decisions for extraordinary protection from monetary liability in the form of just compensation. Decisions implementing harsh land use regulations will not be made without knowledge of the constitutional problems. Landowners will almost always protest such actions at the time they are initially proposed. Moreover, unlike most claimants alleging a constitutional deprivation in court, most developers or home builders will go to court only as a last resort because they must continue to work with the same local governments in seeking approvals for other proposed land uses which are necessary to their business. They thus have a strong incentive not to alienate local land use decision makers by suing them. See Bauman, *supra* at 58 n.228.

land use actions rise to the level of a regulatory "taking," the standard proposed by CBIA—which requires the land to be deprived of all or most of its beneficial use—imposes a heavy burden upon the landowner to satisfy in order to obtain any compensation. Municipal planners therefore need not fear any significant change in how they operate if the Court expressly subjects their decisions to the strictures of the Just Compensation Clause and makes available to property owners just compensation for "takings" effected by oppressive land use decisions which deny owners any beneficial use of their land and utterly frustrate their reasonable expectations in the property.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

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BRIEF

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SUPREME COURT
OF THE UNITED STATES

October Term 1985

MACDONALD, SOMMER
& FRATES, ETC.,

Appellant,

vs.

THE COUNTY OF YOLO
and THE CITY OF DAVIS,

Appellees.

ON APPEAL FROM
CALIFORNIA COURT OF APPEAL

BRIEF OF AMICI CURIAE LODESTAR CO.,
ROBERT J. TROUTMAN, JR., AND THE
GHERINI FAMILY, IN SUPPORT OF
APPELLANT.

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No. 84-2015

IN THE
SUPREME COURT
OF THE UNITED STATES

MACDONALD, SOMMER
& FRATES, ETC.,

Appellant,

vs.

THE COUNTY OF YOLO
and THE CITY OF DAVIS,

Appellees.

ON APPEAL FROM
CALIFORNIA COURT OF APPEAL

BRIEF OF AMICI CURIAE LODESTAR CO.,
ROBERT J. TROUTMAN, JR., AND THE
GHERINI FAMILY, IN SUPPORT OF
APPELLANT.

With consent of the parties, Lodestar Co., Robert J. Troutman, Jr., and the Gherini Family respectfully submit this brief as amici curiae, in support of the Appellant.

INTEREST OF AMICI

Lodestar Co. is a California corporation which owns lands in the upstate California county of Mono, where it is being subjected to a variety of abuses by local governmental entities so that it is unable to put its land to any use, even though it has been in compliance with all local and state laws, and even though it has dedicated land to local governmental entities and constructed public improvements as requested by those entities, all involving expenditures on the part of Lodestar Co. running into the millions of dollars. Lodestar Co. is currently a plaintiff in the U.S. District Court in California, where its plea for relief is complicated and delayed by the uncertainty and complexity of current law on the taking issue. Determination by this Court of pertinent substantive rules and clarification of remedial standards, will thus aid this amicus as well as many others similarly situated throughout the country, in establishing entitlement to relief, and if so, what kind.

Robert B. Troutman, Jr. is a retired Atlanta lawyer who is, and for a number of years has been, the principal beneficial owner of some 1,300 acres of land on the southwest Florida coast near Ft. Myers. Most of this land is "wetlands" in need of fill in order to render it useful for any economically viable purpose.

Over the years, the county has increased ad valorem taxes on the Troutman property, while at the same time denying any use which would enable Troutman to pay the taxes; i.e., it has limited use to only one single-family dwelling unit per 40 acres. This limited use is of no

significant value in itself, and is rendered totally worthless by the enforcement policy of the U.S. Army Corps of Engineers applying EPA guidelines adopted under Section 404(b) of the Clean Water Act. The Corps proclaims that a permit to fill wetlands will not be granted unless the proposed use is "water dependent", and that residential use does not so qualify.¹

This is a "Catch-22" situation. Unreasonable as it is, Lee County purports to permit one dwelling unit per 40 acres, but none can be built without filling. The Corps permits *no* filling. The result of this whipsaw of county and federal regulations exposes Troutman to economic wipeout through tax liens and foreclosure.

The Gherini Family owns a 6380-acre portion of Santa Cruz Island, one of the Channel Islands off the California Coast, near Santa Barbara. The property has been in the family for over 100 years and has been historically used as a sheep ranch. In recent years changing economics have made raising sheep a losing proposition. In 1980 the Congress included Santa Cruz Island in the enabling legislation creating the Channel Island National Park. However, so far, Congress has not appropriated any funds for acquisition, and given the current budgetary situation in Washington, none are in the offing. The County of Santa Barbara, complying with the demand of the California Coastal Commission, has rezoned the subject property from an agricultural use that permitted one dwelling per 10 acres, to one dwelling per 320 acres, or for "cluster development" on a mere 2% of the 6000-acre parcel, leaving the remaining 98% as "dedicated open space". Such use is not economically possible. Moreover, although the county's regulation permits energy development consistent with historical zoning, the Coastal Commission has banned

¹ According to the Corps, little other than marinas and public docks are considered "water dependent" uses.

such use of the property which is located in the area of one of the largest and most productive oil fields in the Nation (i.e., the Santa Barbara Channel).

Thus, for all practical purposes, for the past half-dozen years the Gherini family has been conscripted as involuntary keepers of public "open space" which cannot be used for any economically viable or rational purpose.² In the meantime, in the name of "regulation" the Gherini family has been deprived of all use of its land that has been in the family for a century, leaving them only the dubious "right" of having to pay taxes and bear other obligations of land ownership, but forego any benefits associated with the very concept of property ownership.

ARGUMENT

THERE IS CHAOS IN THE FIELD OF INVERSE CONDEMNATION THAT DES- PERATELY NEEDS THIS COURT'S REME- DIAL ATTENTION.

The *ad hoc*, case by case approach to the "taking issue" favored by this Court thus far³ has led to a situation in which predictability has been sacrificed to flexibility to such an extent that neither private nor public parties across the

² The Gherinis' predicament is thus strikingly similar to the situation vividly described by the Court of Claims in *Drakes Bay Land Co. v. United States*, 424 F.2d 574, 586 (Ct. Cl. 1970): "Thus plaintiff remains without a market for its land. The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation . . . The public sector, namely the National Park Service, is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure."

³ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124 (1978).

Nation are able to ascertain what their rights are without first litigating through the highest appellate level. This is wasteful of the parties' and courts' resources, and in some parts of the county has inspired chaotic conditions.⁴

The state of the law thus only provides incentives to litigation as both sides to this durable controversy press their causes on the courts in an effort to reduce to precedent to the infinitely variable facts of each individual dispute. While the flexibility employed by the Court thus far, has much to commend it, the Nation now desperately needs definitive guidance from this Court as to where flexibility ends and precedent begins. This Court's recent emphasis on procedural prerequisites has only exacerbated the problem, because people whose property rights are not enforceable in the state courts, have no alternative but to turn to the federal judiciary.⁵

The traditional mechanisms of land use regulation have undergone a revolutionary change recently. The notion of

⁴ E.g., In California, the State Supreme Court has held that there are to be no damages for regulatory takings (*Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979) (aff'd. on other grounds, 447 U.S. 255 (1980))), while the U.S. Court of Appeals for the Ninth Circuit holds this to be wrong (*In re Aircrash in Bali*, 684 F.2d 1301, 1311, fn. 7 (9th Cir. 1982), *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983). In New England the opposite is true. There, the First Circuit — being a minority of one among the Circuits — hews to the California no-compensation approach (*Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F.2d 33 (1st Cir. 1980)), while the New Hampshire Supreme Court rejects such a doctrine "out of hand" (*Burrows v. City of Keene*, 432 A.2d 15, 20 (N.H. 1981)).

⁵ This is in keeping with the historical function of the federal courts. In Madison's blunt words:

"... a review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws"; quoted in *Greenwood v. Peacock* (1966) 384 U.S. 808, 836. For similar expressions by this Court see, *Martin v. Hunter's Lessee* 1 Wheat, 305, 347-348 (1816), *Bank of U.S. v. Deveaux* 5 Cranch 61, 87 (1809).

yore that construction of improvements on land need only be preceded by compliance with a zoning ordinance and building codes, and issuance of a building permit, has by now joined such a venerable images as the hand-cranked automobile. In some parts of California a dozen permits may be required before a landowner may construct a home for his own use.⁶ In the case of larger scale projects, the regulatory travails become mindboggling, with literally scores of permits from scores of agencies required, all resulting in an economic nightmare that at times not even the nation's wealthiest enterprises can afford.⁷

Another important element of the revolutionary change in land use regulations is the balkanization of regulatory authority. No longer is one confronted with obtaining approval from a readily identifiable local regulatory entity operating under a coherent set of regulations. The historical dominance of this area of law by towns and counties governing their own territories, has been overlaid by a layer

⁶ In the aftermath of this Court's decision of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a knowledgeable commentator noted that it would have cost Mr. and Mrs. Agins some \$50,000 to apply for permission to build, "[a]nd spending that sum would not have necessarily gotten them permission to build five houses. The answer to the question 'Simon, may I build?' might have been, 'Yes, but only one or two houses.'" Smith, *An Inverse Condemnation Puzzle: The Agins Case Lands in Limbo*, 2 Nat.L.Jour. (No. 2, Aug. 4, 1980, p. 52, at 53).

⁷ It is undoubtedly subject to judicial notice, in light of these events' enormous notoriety, that such giants as Sohio, Dow Chemical, and Walt Disney were forced to abandon their plans for major projects in California, not because these projects were ever substantively adjudged to be illegal or environmentally "bad", but simply because not even these enterprises, for all of their Croesus-like resources, could bear the economic burdens of interminable regulatory maneuverings that after the expenditure of many millions of dollars and years of effort, produced no approvals, and only promised further consumption of time and money in pursuit of increasingly hydra-headed regulatory demands with no prospect of resolution in sight — only prospects of litigation.

cake of agencies that range all the way from state and regional bodies (such as the California Coastal Commission), all the way to bistate entities (such as the Tahoe Regional Planning Agency) and federal agencies. Along with these novel regulatory super-agencies, the land use regulatory process has also been honey-combed from the bottom, as it were, by a multitude of mini-authorities such as local wetlands and historical conservation districts, etc. Moreover, as the case at bench shows, landowners have to contend with informal interaction between their jurisdiction (the county) and a nearby city which in principle — if not a grim reality — is not supposed to control land uses outside its own boundaries. Finally, as if all that were not enough, it now seems clear that the people of a community, can simply take matters into their own hands, and by initiative or referendum vote to change the zoning of even a single lot in their community. See *City of East Lake v. Forest City Enterprises*, 426 U.S. 668 (1976).

This is not to debate here the wisdom of such arrangements; the point rather is that they have necessary constitutional consequences, and legal concepts evolved in an earlier day frequently prove ineffective to protect constitutional rights, as those rights come under attack by techniques undreamed of when the basic principles of pertinent law were laid down more than a half-century ago. In short, just as this Court noted the need to recognize the changing social conditions in approving novel regulations (see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)), so too, there is a correlative need to recognize that the new regulations may impact on society in onerous ways. The problem which desperately needs attention from this Court is that these mushrooming regulatory powers must somewhere along the line be circumscribed by the vital concept of accountability to the Constitution in a precedentially clear way. The traditional judicial deference to land use regulations needs to be balanced against

constitutional values. Eventually this facet of governance — like all others — must be recognized as having discernible limits, and the nation needs to be told what those limits are. See *Moore v. East Cleveland*, 431 U.S. 494, 513-514 (1977), Stevens, J., concurring. Great governmental powers without such limits invite abuses.

The problem is exacerbated by the fact that often the regulating is done by diverse entities with fragmented parochial interests.⁸ With their good intentions fueled by professed (or at least asserted) nobility of their socio-ideological goals (such as protection of the environment, urban aesthetics, historical preservation, growth control, etc.) they promulgate contradictory regulations that often stultify literally all economically rational uses of land. The specter of American landowners being told to pay their taxes while simultaneously being denied any rational use of their property that would justify the values on which they are being taxed is not an exaggeration; it is a growing reality in many parts of this country.⁹ Such is the plight of these

⁸ The authors of "Windfalls for Wipeouts". Am.Soc. of Planning Officials; 1978, have termed it "a synergistic nightmare, a paralyzing mishmash", and a "bubbling cacophony of multitudinous edicts." Hagman and Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in The Land Markets*, The Real Estate Appraiser, Sep.-Oct. 1974, p. 5, at 7.

⁹ Thus, California law is replete with cases in which landowners were driven into bankruptcy and foreclosure while being denied any economically rational use of their land. See e.g., *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti v. Fremont*, 80 Cal.App.3d 961, 146 Cal.Rptr. 75 (1978); *Hollister Park Investment Co. v. Goleta County Water Dist.*, 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal.App.2d 736, 141 Cal.Rptr. 820 (1977); *County of Los Angeles v. Berk*, 26 Cal.3d 201, 161 Cal.Rptr. 742, 605 P.2d 381 (1980); *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934, 162 Cal.Rptr. 210 (1980); see *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972).

amici curiae (see pp. 1-3, *supra*).

These observations must not be understood as derogating from the goals of good faith regulations intended to preserve for ourselves and for posterity the blessings of a wholesome environment. Rather, the point is that however commendable these ends may be, they must still be pursued by means that are respectful of the Constitution.

A supposed "property" system in which the ostensible owner cannot tell what rights he "owns" until he tries to exercise them,¹⁰ and even then only after ruinously costly (and often pointless) administrative proceedings with a whole separate multi-tier appellate process, and only then litigation in the courts, is an illusion. Only the most wealthy (and the most determined) persons can even try to seek protection of their constitutional rights. As this Court astutely observed in *Willow River Power Co. v. United States*, 323 U.S. 499, 502-503 (1945), "property rights" are only those economic advantages which the law will protect. Disabling one from being able to tell what the law will protect (and worse, *de facto* removing such legal protection, while paying lip service to it), effectively destroys the very idea of property. The *Willow River* concept of legally protected economic advantage is thus *de facto* transmogrified into a system in which its legal status flows not from neutral legal principles, but from the practically unreviewable whim of a local (often parochially-minded and politically inspired) regulatory body, as so vividly illustrated by the case at bench.

¹⁰ As the California Supreme Court conceded, the judicial patterns of distinguishing between "taking" and "police power" "... at best ... have served as a shorthand method of indicating the result. . .", *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 522, 125 Cal.Rptr. 365, 542 P.2d 237 (1975). Surely, the institution of property and the constitutional values inherent in it (see *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)), are entitled to a greater degree of judicial protection than such outright semantic manipulation.

This Court has now fulsomely refined the procedural preconditions to pursuing substantive remedies. What is desperately needed now is development of clear substantive doctrine, and clarification of the law of remedies.

A RATIONAL AND FAIR SYSTEM OF REMEDIES FOR TAKINGS MUST INCLUDE JUST COMPENSATION TO BE EFFECTIVE AND SOUND.

A. This Court Has Consistently Expressed Its Endorsement Of Just Compensation As The Primary Remedy In Taking Cases.

Just as this Court has recognized the need for flexibility in making determinations of whether takings have occurred, so too there is a need for flexibility in providing remedies. Sometimes, invalidation may be sufficient; at other times, however, just compensation may be the only remedy that will make the owner whole. Often, a combination of the two will do the job best; see *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657-660 (1981), Brennan, J., dissenting. Indeed, compensation may be desirable from the government's point of view where major policies are pursued by the challenged regulations.¹¹

Thus, the California absolutist dogma forbidding payment of just compensation in all cases of regulatory takings, irrespective of circumstances or of the economic impact on the aggrieved owner, warrants rejection. This conclusion is both pragmatic and finds support in this

¹¹ Historically, in every case involving the question of remedies for uncompensated takings to which the United States was a party, the Government argued that just compensation ought to be the remedy, beginning at least with *Hurley v. Kincald*, 285 U.S. 95 (1932).

Court's unbroken chain of decision dealing with remedies for takings: *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Dugan v. Rank*, 372 U.S. 609 (1963); *Fresno v. California*, 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Dames & Moore v. Regan*, 453 U.S. 654, 688-689 (1981). Also, see *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-753 (1950) (taking effected by state police power gives rise to right to just compensation, even though invaded right not protectible by injunction).¹²

It is difficult to see how this Court could have been clearer, when it unequivocally held in *Ruckelshaus v. Monsanto Co.*, —U.S.—, 104 S.Ct. at 2880 [8] (1985):

"Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking" (citations and footnote omitted).¹³

¹² For a further discussion of *Gerlach* in the context of California law, see Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, p. 177, at 199-204.

¹³ A seemingly inconsistent assertion appears in footnote 12, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166 (1958). However, the only authority cited there in support is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, which, of course, dealt with a prospective, wholly extralegal seizure (by an official), rather than an already accomplished taking by exercise of governmental powers. To the extent the terse footnote assertion in *Central Eureka* is inconsistent with the fully considered holding in *Ruckelshaus v. Monsanto Co.*, the former must undoubtedly be deemed overruled sub silentio by the latter. However, the two expressions need not necessarily be viewed as inconsistent, when the prospective vs. accomplished nature of the respective types of takings is kept in mind. Moreover, the *Central Eureka* footnote addresses "arbitrary governmental action" rather than a taking; the two, of course, may, but need not be the same.

It is equally well settled that it is only in those rare cases where a government official attempts to act but, as it turns out, the act is wholly extralegal (i.e., the claimed power to act does not stem either from the Constitution directly, nor is it authorized by legislation) that injunctive relief becomes available to restrain a prospective taking. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. 579, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-691 (1949). Of course, where a taking (i.e., deprivation of the owner, not necessarily accretion of any formal interest to the taker — *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945)) has actually occurred, it has been held from the outset that the government, as a creature of the Constitution, cannot even form the intent (much less act on it) to deprive an individual of property without just compensation. *Meigs v. McClung's Lessee*, 9 Cranch (US) 11, 18 (1815). Also, see *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

To the above one must add the teaching of *Ruckelshaus* that in inverse as well as direct taking cases the police power and taking power are coterminous (104 S.Ct. at 2879). That perforce means that when a governmental entity regulates to promote police power objectives of public health, safety, welfare or morals, it thereby establishes a legitimate objective that is entitled to the same degree of judicial deference as the avowed pursuit of the eminent domain power for a public purpose; see *Hawaii Housing Authority v. Midkiff*, —U.S.—, 104 S.Ct. 2321, 2329 (1984); *Ruckelshaus*, *supra*, 104 S.Ct. at 2879. Since the judicial role in "second-guessing the legislature" is held by these authorities to be extremely narrow, it follows that a regulatory taking effected by pursuit of police power objectives is in every constitutional sense a taking for public use, for which compensation is mandated by the Fifth Amendment (binding on the state through the Due Process Clause of The Fourteenth Amendment — *Webb's Fabulous*

Pharmacies v. Beckwith, 449 U.S. 155, 160 (1980)). Put another way, when regulators take the position that their regulation promotes the public good, and as such is entitled to judicial deference for purposes of its validity, they cannot simultaneously assert when their regulation effects a taking, that the regulation suddenly becomes so unimportant that the courts should disregard the teachings of *Midkiff* and *Ruckelshaus*, eschew deference to the legislature, and as matter of routine simply invalidate the regulation — as a first, not last, resort — merely to spare the regulators the need of obeying the weighty “just compensation” command of the Fifth Amendment. Such an argument is simply self-contradictory; it just won’t wash. “[P]ower, once granted does not disappear like a magic gift when it is wrongfully used.” *Bivens v. Six Unknown Federal Narcotics Agents*, *supra*, 403 U.S. at 392.

B. This Court's Precedential Analysis Favors Availability Of Just Compensation as a Remedy.

Both in terms of holding and rationale, *Hurley v. Kincaid*, *supra*, is well nigh dispositive. The Court's reasoning in rejecting the owner's attempt to secure a non-monetary remedy is clear. Of particular interest is the Court's reasoning that proceeds from the premise that the Act in issue there was valid¹⁴ (285 U.S. at 103), and once that is established, the question becomes whether the owner's constitutional rights are protected when just compensation is provided, or whether the whole law must fall because of lack of compensation. Mr. Justice Brandeis' answer to that question in *Hurley* is difficult to quarrel with: the owner's grievance in such cases is *not* that the

¹⁴ While in *Hurley* this was conceded, it is basic that validity of a law cannot be made dependent on a citizen's concession.

government takes his land, but rather that the taking is without compensation. In other words, it is the lack of compensation that offends the Constitution, not the taking, for the latter is an inherent power of government (*Kohl v. United States*, 1 Otto (U.S.) 367 (1876)) that exists independently of the Constitution which only imposes conditions to its exercise (*Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)). It follows, therefore, that if compensation is provided by the courts (whether at the government's or the owner's behest) the flaw in the governmental action is cured, and there is no illegality (see 285 U.S. at 104). For it is the courts — not the legislature — that have primacy in fixing and awarding “just compensation”, *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1896).

C. The Notion Whereby Courts Would Be Required to Invalidate Legislation as the Measure of First Resort is Unsound and Contrary to Settled Principles of Constitutional Jurisprudence.

Nor did *Hurley* stop there; it went on to note:

“Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon a clear showing that its intervention is necessary to prevent an irreparable injury.” 285 U.S. at 104, fn. 3.

That observation, of course, puts its finger on the heart of pertinent policy considerations: it would be improvident to require the courts *as a constitutional imperative* to strike down vital governmental regulatory schemes, merely

because they impact on one affected property owner so as to deprive him of a "stick" in his property rights "bundle". *The Regional Rail Reorganization Act Cases, supra*, provide an excellent example of the hazards inherent in such a theory. Had it been applied there (as indeed it was by the trial court, only to be reversed by this Court) the upshot would have been an instant destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with eight major railroads in the throes of fragmented, individual bankruptcy proceedings, without a coherent system whereby to consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system. The same is true of *Dames & Moore v. Regan, supra*. Had the invalidation only, no-compensation approach been applied there, the result would have been drastic disruption of the executive power to conduct foreign relations, with severe consequences to the affected citizens. Instead, the Court's opting for availability of the compensation remedy preserved both the governmental policies, and the rights of the few adversely affected individuals. While the instant case does not present the Court with such far-reaching prospects, it still should not serve as a vehicle for the formulation of a dogmatic constitutional imperative that in future applications would compel judicial destruction of regulatory schemes that some day may be important to national survival.¹⁵

¹⁵ This is no hyperbole. Surely, it takes no vivid imagination to visualize governmental responses to the difficult problems of security, energy, deficit control, and inflation, for example that may trench on constitutionally protected property rights of some individuals. Should that occur, which would be better public policy: to require the benefited public to pay only for those limited private rights destroyed in the process of thus bettering the public condition (see *San Diego Gas & Electric Co.*, 450 U.S. at 652), or to declare such programs completely

As Mr. Chief Justice Marshall enduringly put it:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. *This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.* This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819).

The California dogma that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, ignores the socio-political gravity of judicial intervention in the workings of a tri-partite government. When the judiciary invalidates a legislative enactment it is a measure of last — not first — resort. The judicial power to invalidate is a historically rooted power of "strict necessity" (*Rescue Army v. Municipal Court* 331 U.S. 549, 568-569 (1947); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co. v. Timken-Detroit Axle Co.*,

invalid, with possibly calamitous consequences? (*Hurley*, 285 U.S. at 104, fn. 3). As the Court of Claims astutely noted in *Drakes Bay Land Co. v. United States*, 242 F.2d 574, 587 (Ct. Cl., 1970), where the "convergent pressures" of desired governmental objectives and governmental unwillingness to pay for what it wants, impact on the innocent landowner caught in the middle, it is recourse to inverse condemnation that "... has saved the day in many another sticky situation."

329 U.S. 129, 136 (1946)). See *Rescue Army v. Municipal Court*, *supra*, 331 U.S. at 571-572.

The doctrine adhered to below ignores the grave strain that judicial invalidation of legislation imposes on the social fabric. It improvidently requires the judiciary to impose constraints on what the legislature may or may not enact, not in the historical context of major, earthshaking policy decisions that have confronted the nation on occasion and thereby made legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case adjudications of purely local (usually political) decisions involving what in policy terms are but insignificant patches of land. Appellees' approach would make the judiciary an ongoing supervisor of the local legislative branch;¹⁶ it would make this Court the Supreme Board of Zoning Appeals.

The foregoing is no hyperbole. Only a few states' law provides so-called site specific non-monetary relief,¹⁷ i.e., judicial relief in the form of a decree that commands the regulating entity to allow a specified improvement on the

¹⁶ Please recall that effective injunctive relief involves judicial oversight and ongoing enforcement.

¹⁷ See e.g. *Sinclair Pipeline Co. v. Village of Richton Park*, 167 N.E.2d 406, 411 (1960, Ill.). That may be the reason why Illinois practitioners have emerged in the forefront of commentators critical of the compensation remedy, and of Justice Brennan's views articulated in *San Diego Gas & Electric Co.*; see e.g., Williams, et al. *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984) — a curiously named polemic, if not diatribe. The authors of "The Taking Issue", Govt.Prnt.Off. 1973, shared the same background. Yet, Mr. Babcock (one of the "Manifesto's" authors), at least, understands full well that it's another story in California; see *infra*, fn. 18, and see particularly the Amicus Curiae Brief of First English Evangelical Church of Glendale et al., which deals with California law in greater detail. Not too surprisingly, the "Manifesto's" authors wind up plumping for — what else? — "modification of the Illinois system" (9 Vt. L. Rev. at 241).

specific site (sometimes called a "builder's remedy"). The vast majority of jurisdictions (in those cases where non-monetary relief is granted) merely remand the matter back to the regulatory entity for further action, thus inviting ongoing judicial involvement. Aside from the delay-laden inefficiency of such a procedure, it also opens up vast opportunities for either regulatory foot-dragging or outright bad faith, as acutely noted by Mr. Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*, *supra*, 450 U.S. at 655, fn. 22.¹⁸ And of course, injunctive relief

¹⁸ It must be noted with great emphasis that the problem is far more pervasive than one might surmise from the entirely accurate, if somewhat flippant, remarks of a California city attorney quoted there. No less an expert than Richard F. Babcock, noted the severity of the problem in his book, "The Zoning Game" (Univ. Wisc. Press, 1966) at pp. 12-13, with devastating accuracy:

"In the area of zoning there is no centralized umpire to provide a sense of belonging to a common administrative practice, and, indeed, of sharing a common administrative ethic. Among these scattered groups of lay decision-makers there is an almost total lack of communication despite the efforts of innumerable planning groups, each offering earnest if generally diffused guidance. One of the most significant results of this fractured decision-making process is that the injunctions of the judiciary have only nominal impact upon the decision-makers. If the Supreme Court of California makes a determination that the California Public Utilities Commission has acted improperly, the impact of that judicial determination is direct and, in most instances, decisive. But if the Supreme Court of California were to say to the local legislature in Community X that its policy is improper that injunction, I suspect, would have little practical impact upon the identical administrative actions of Community Y or perhaps even on Community X itself. Other lawyers have shared the experience that follows a victory on behalf of a landowner in the state Supreme Court. You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to sue the property for commercial purposes.

requires ongoing judicial supervision and enforcement.

In sum, sound, time-tested reasons of public policy respectful of the doctrine of separation of powers, counsel against the judiciary's, too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis. Legislatures know best what their constituencies need and what they can and cannot afford,¹⁹ and no sound reason appears why the courts should be

The community immediately rezones the property to a Duplex Zone and invites you to spend another two years and thousands of dollars litigating that classification.

"This indifference to judicial decisions applies, by the way, even in jurisdictions such as Maryland, where, as in Baltimore County, there are relatively few independent municipalities and decisions with respect to land use are centralized in the county itself." Emphasis added.

Of course, since the time Mr. Babcock wrote, things have changed and a second round of litigations these days can easily consume a multiple of the "two years" he alludes to, to say nothing of hundreds of thousands of dollars.

¹⁹ Every municipality needs transportation, and every one owns automobiles for that reason. Yet no one has ever suggested that a municipality should have the power to exact Cadillacs from local car dealers as a condition of issuance of a business license, when the municipal budget only allows for Fords. No reason appears why similar reasoning should not apply to a municipality's real property needs and desires; as Mr. Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), where a community has been so shortsighted as to fail to acquire enough for its needs [as determined by it], no reason appears why the courts should step in and supply the desired additional increment of social benefit gratis, any more than they supply any other community resources. Accord, *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962), (a community that constructs a bridge or airport without adequate approaches is not entitled to acquire them gratis by a claim that it is "regulating"). The decision to allocate local funds in a matter of local choice (see *United States Trust Co. v. New Jersey*, 431 U.S. 1, 28-29 (1977)), and it is illegitimate to choose to deny constitutional rights because that may be cheaper (*Watson v. Memphis*, 373 U.S. 526, 537 (1963)).

called upon to assume a paternalistic role in this peculiarly legislative area of fiscal decision making, by telling local legislatures on an ongoing basis what they may or may not enact. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704-705 (1949) for a forceful exposition of the underlying "... strongest reasons of public policy".

D. Obedience to Constitutional Values is No Less Worthy in Cases Involving Property Rights Than in Others.

It has been argued in cases of this type that regulatory bodies supposedly face a dilemma: they must regulate to meet the needs of the times, but they cannot tell when their edicts trench on constitutional rights. The implication is said to be that this asserted difficulty somehow earns them the right to become the beneficiaries of judicial rescue operations, to keep them from having to face the economic consequences of their own informed and pre-eminent decision making. This, with all due respect, is a false dilemma. If the regulators are astute enough to select and pursue their chosen governmental ends, they should also be responsible enough to select appropriate means. As this Court pointedly noted in *International Paper Co. v. United States*, 282 U.S. 399, 406 (1930):

"The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late."

Moreover, such arguments defy the Constitution's primacy. As Mr. Justice Brennan astutely observed in *San Diego Gas & Electric Co.*, *supra*, 450 U.S. at 661, fn. 26: "After all, if a policeman must know the Constitution, then why not a planner?" That question cuts to the heart of the matter, and — if anything — goes easy on the planner. For

Justice Brennan's policeman, reacting instantly to deadly peril, all alone in a dark alley, often with limited formal education and experience, still must know *and obey* the Constitution — or be accountable for his refusal to do so.²⁰ No respectable reason appears why the municipal land use establishment, replete with professional planners and engineers, legal counsel and expert consultants, fully advised of its responsibilities every step of the way, and acting at leisure (usually, as at bench, literally taking years to effect a taking of the hapless owner's property) should claim for itself a privileged, lesser standard of accountability to the Constitution. See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the inevitable in Land Use Controls*, 15 Rutgers L. Rev. 15, 99 (1983).

²⁰ In an astonishing display of intellectual parochialism of the land use bar, it has been suggested in a polemical response to Mr. Justice Brennan that all a policeman needs to know about the Constitution may be found on a "Miranda card"; see 9 Vt. L. Rev. at 196 and 225. Were it not for the prominence — in the land use area, to be sure — of these commentator/advocates, one might be tempted to disregard such a suggestion as either grossly uninformed or a dubious attempt at humor (see *Id.* at 194, fn. 10). But to the extent such an amazing statement was meant seriously, suffice it to observe that a policeman must also know the constitutional implications of arrest and legitimate basis therefor, search and seizure, the permissible extent of use of force in making the arrest, and — after the "Miranda card" has been duly read — what constitutes a proper waiver of the right to remain silent and the right to counsel. These are all topics whose constitutional contours may be unclear, and which regularly inspire dissents even among the ablest jurists. Perhaps an insight into the mistaken and intemperate tenor of the last-cited commentary may be provided by the fact that its authors have failed to disclose their advocacy interest in the issue before the Court, thus illustrating the wisdom of Mr. Justice Douglas when he observed in Douglas, *Law Reviews and Full Disclosure*, 40 Wash. L. Rev. 227, 229-230 (1965) that "The reader should know through what spectacles his adviser is viewing the problem."

E. Constitutionally Protected Property Rights Need Protection Against Chilling by Governmental Overreaching, Not Vice Versa.

It has also been argued that if just compensation is permitted for egregious violation of constitutional property rights, that will "chill" even the benign exercise of regulatory powers. This, like most "parade of horrors" arguments, is a bit shopworn, and has already received short shrift from this Court.²¹

Moreover, this latter-day notion of "chilling" stands logic on its head. The concept of "chilling" rests on the idea that rights protected by the Constitution are so precious that they require judicial protection not only from outright invasions, but also from governmental activities that, though not crudely violative of the constitutional letter, would in practice erode those cherished rights. *That* is what legitimate concerns over "chilling" are all about.

To argue in favor of standing this concept of "chilling" on its head, and to demand that the constitutional values be narrowly circumscribed, lest those who would violate them be "chilled", is simply an Orwellian inversion of the English

²¹ "...[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis*, 373 U.S. 526, 537 (1963). See *Gates v. Collier*, 501 F.2d 1291, 1319-1320 (1974, 5th Cir.). As one noted commentator put it:

"At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore the year before much too long ago." Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 620 (1961).

language. The ethical and logical basis on which the concept of "chilling" rests means to protect the individual citizen from constitutional overreaching by the powerful government, not the other way around. It is indeed supposed to provide disincentives to the government when it sets out on a constitutionally suspect path. Confronting a would-be constitutional violator with the prospect of unpleasant consequences is not "chilling" — it is deterrence from wrongdoing. See *Owen v. City of Independence, supra*, 445 U.S. at 651-652, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 407-408 (1971), Harlan, J., concurring.

It would be an anomalous inversion of societal values to say that constitutional violations should be encouraged, lest their discouragement work a "chilling" of those who would set out on a path of collision with the nation's organic law. As this Court observed in *Owen, supra*, the law should provide incentives such that errors in municipal judgment should be on the side of protection of citizens' constitutional rights, not in their derogation.

F. Availability of Just Compensation as One of the Remedies Makes Judicial Responses to Takings More Capable of Doing Individual Justice to Both the Aggrieved Citizen and the Government.

Beyond the above considerations, there are additional practical reasons that favor just compensation as a remedy. If the regulating entity effects a taking and confronts monetary liability, it has several ameliorating options available to it. It can, for example, in those situations where its conduct is not egregious, and a full irreversible taking has not been effected, amend the regulation so as to avoid the continuing constitutional violation, while preserving its proper regulatory objectives to an optimal degree. See *San*

Diego Gas & Electric Co. v. San Diego, supra, 450 U.S. at 658-660; *U.S. Trust Co. v. New Jersey, supra*, 431 U.S. at 29-30. In such cases, this reduces liability to compensation for a temporary or partial taking. Even assuming the worst possible scenario from the regulating entity's point of view (i.e., those situations where the courts find the invasion of private property rights to be so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset²² whose acquisition axiomatically better the public condition. Moreover, if the municipality should decide that the asset thus acquired is indeed beyond its means (or, more accurately, beyond its willingness to acquire), it would have the further option of selling the land thus acquired.²³

It should go without saying, but unfortunately it is often the subject of contentious debate, that a finding of "taking" does not mean that the taking entity must acquire the full fee simple title to the property in question. What has been taken depends on the facts of each case; it may be a temporary taking,²⁴ a partial taking of only a subordinate

²² In other words, for its money, the municipality acquires its equivalent in the form of land whose price is judicially determined as being its contemporaneous fair market value.

²³ This idea is hardly novel. It is now authorized in cases of so-called excess condemnation, whereby under some circumstances a public entity condemns more land than it will use for the public project (see Cal. Code Civ. Proc. § 1240.430). Such excess acquisition may occur because the government desires it (see *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946), *People v. Superior Court*, 68 Cal.2d 206, 65 Cal.Rptr. 342, 436 P.2d 342 (1968)), or because the owner does (see Cal. Gov't. Code § 7267.7, 42 U.S.C. § 4651(9)). Either way, resale of land acquired by the government is hardly unusual; indeed, it is an essential feature of urban redevelopment programs; *Berman v. Parker*, 348 U.S. 26, 33-34 (1954). See, *Hawaii Housing Authority v. Midkiff* —U.S.—, 104 S.Ct. 2321 (1984).

²⁴ *Lomarch Corp. v. City of Englewood*, 237 A.2d 81 (1968, N.J.) — regulation deemed a taking of one-year option to buy. *Keystone*

property interest,²⁵ or, if the circumstances are egregious enough it may a full taking.²⁶ See *San Diego Gas & Electric Co.*, *supra*, 450 U.S. at 657-658.

Such recognition of the proper role of compensation in the constitutional remedial scheme would further provide proper incentives and disincentives for municipal fine tuning of regulations so as to meet at once the desirable goals of accomplishment of basic regulatory objectives (albeit possibly not to the degree that may be desired by community environmentalist zealots (see Frieden, "The Environmental Protection Hustle" (1979, MIT Press), *passim*, also see Tucker, "Progress and Privilege: America in an Age of Environmentalism", Anchor Press/ Doubleday, 1983) while still affording protection to the rights of the regulated (see *U.S. Trust Co. v. New Jersey*, *supra*, 431 U.S. at 29-30). In contrast, the California rule allows an irresponsible governmental entity to have a go at confiscatory regulation, without fear of meaningful adverse consequences, save only an occasional judicial word of disapproval which might momentarily hurt the municipality's pride but leave it free to "regulate" anew (see *infra*, fn. 27 and 28). It is a positive disincentive to responsible governmental conduct.

Associates v. State, 371 N.Y.S.2d 814 (1975, Ct. Cl.) rev'd. 389 N.Y.S.2d 895 (1976, App.Div.), rev'd. and remanded 45 N.Y.2d 894, 383 N.E.2d 560 (1978, N.Y.) — regulation worked temporary taking. *Gordon v. City of Warren*, 579 F.2d 386, 387 (1978, 6th Cir.) — temporary taking. *Jones v. People*, 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978) — regulating worked temporary taking of access. *City of Austin v. Teague*, 570 S.W.2d 389 (1978, Tex.) — regulatory activity worked a temporary taking; out-of-pocket losses compensated. Accord, *San Antonio River Authority v. Garret Bros.*, 528 S.W.2d 266 (1975, Tex.Civ.App.).

²⁵ *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963) — regulation effected taking of easement.

²⁶ *Benenson v. United States*, 548 F.2d 939 (1977, Ct. Cl.), *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (1970, Ct. Cl.) and 459 F.2d 504, 505 (1972, Ct. Cl.).

Moreover, a finding of compensatory liability, subject to such fiscally ameliorative measures would have the wholesome effect of removing the crushing burden of delay and uncertainty from the afflicted landowners by removing incentives to delay, while allowing the regulating entity a rational basis on which to assess, discount and forecast its exposure, and thereby reach informed and decisive cost/benefit conclusions when it sets out to regulate property in pursuit of its social benefit goals.

G. Just Compensation Needs to be Retained as a Remedy Because Invalidation is Often Ineffective and is De Facto Not Available in California.

As noted *supra*, p. 17, only a few jurisdictions follow the rule of ordering that the owner be allowed to proceed with his project upon a showing that the challenged regulation is invalid. California, however, is *not* one of those jurisdictions. Not only does invalidation in California mean that the supposed "victor" has to face his adversaries as adjudicators on remand, where his ultimate fate depends on the good faith of his adversaries (putting the fox in charge of the chickens, as it were) but California law goes even further. It grants the regulatory agency a *carte blanche* simply to change the regulation at any time, even while its validity is being litigated, or even if it has been found invalid.²⁷ Such a rule has manifest potential for abuse, and

²⁷ Thus, a California landowner may find himself challenging a blatantly illegal regulation in court, only to discover that even as he is about to prevail, the regulation is changed, and he has to start all over again. See *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 809, 524 P.2d 111 (1973). The California Supreme Court says that it does not encourage such, but it certainly does not discourage it, and its actions speak louder than its words; see *Building Industry Assn. etc. v. City of Oxnard*, 40 Cal.3d 1, 4, fn. 2 (1985).

this has been unblushingly noted by municipal lawyers.²⁸

Last but not least, providing interim compensatory damages to the victimized landowner — whether on a temporary taking theory articulated by Mr. Justice Brennan in *San Diego Gas & Electric*, or under 42 U.S.C. § 1983 — is only just. As the Court can readily see from the cases that have come before it recently, landowners in such controversies were deprived of all use of their property for years while having to bear the heavy economic burdens that ownership of real property entails. The plight of these amici (see pp. 1-3, *supra*) attests to that. Moreover, to the extent that courts — both state and federal — all over the Nation have so rapidly and in such large numbers endorsed the *San Diego Gas & Electric* reasoning of Mr. Justice Brennan bespeaks its persuasive fairness (bear in mind that since it was nominally a dissent, no court was obliged to follow it — yet so many did).

To the extent that the concurring opinion of Mr. Justice Stevens in *Williamson County Regional Planning Commission v. Hamilton Bank* — U.S. —, 105 S. Ct. 3108, 3127 (1985), may suggest a different view, amici respectfully point out that such a view was rejected in *Owen v. City of Independence*, 445 U.S. 622, 651-652 (note particularly the

²⁸ "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura*, 10 Cal.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal Law Review 175, 192 (1975). This statement was made not by some untutored bumpkin, but by a California City Attorney who is the author of a treatise on land use law.

language in footnotes 35 and 36). Moreover, Mr. Justice Stevens' hope — and it is a hope not always matched by experience (see fn. 28, *supra*) — that the various zoning boards and such "generally make a good-faith effort to advance the public interest"^{29a} (105 S. Ct. at 3127), is (a) immaterial under *Owen* which rejects the good-faith immunity in § 1983 actions, and (b) would require inquiry into the motives of the local legislatures, which the law does not allow (see, e.g. *Toso v. Santa Barbara*, 101 Cal.App.3d 934, 945, 162 Cal.Rptr. 210 (1980) and cases collected there). Moreover, it is difficult to see why a landowner should be deprived of compensation for economic injury already suffered, any more than Chief Owen was to be deprived of his back pay and benefits lost during the time he had to litigate to vindicate his rights under § 1983, as against the city's claim that it was acting in good faith (see 445 U.S. at 652, fn. 35 and accompanying text). If anything, the landowner in a case of this type is *a fortiori* entitled to compensation, because by denying him reasonable use of his land, and *de facto* converting it to community "open space" or "agricultural preserve", the constitutional wrong against him simultaneously confers a tangible benefit on the community which thus "enjoys the benefits of the government's activities" (445 U.S. at 655). In land use cases particularly, the community enjoys a substantial *quid pro quo* for its payment. "Thus, even where some constitutional development could not have been foreseen by municipal officials,"²⁹ it is fairer to allocate any resulting financial loss

^{29a} See Berger, *Anarchy Reigns Supreme*, 29 Jour. Urb. & Contemp. L. 901, 923-924 (1986).

²⁹ The view expressed in the quoted *Owen* passage is *a fortiori* applicable to regulatory takings for yet another reason. Because of the nature of the land use regulation process (to say nothing of the procedural prerequisites created by this Court in *Agins v. Tiburon*, 447 U.S. 225 (1980) and *Williamson County*, *supra*, 105 S. Ct. at 3119-3122) zoning officials are clearly put on notice by the landowner's applications,

to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights albeit newly recognized, have been violated". (Id.).

CONCLUSION

In the final analysis, both logic and human experience teach that societies can retain their attributes of individual freedom only when property rights are respected along with other human rights. The two are intertwined, and "[n]either could have meaning without the other". (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)). The government which is free to exercise unbridled power over its citizens' material wellbeing is for all practical purposes a *de facto* autocratic government that has little need to impinge overtly on those citizens' other rights.

History also teaches that one simply cannot expect governmental power to restrain itself; the accuracy of Lord Acton's aphorism about the corrupting effects of power has been demonstrated time and again, with depressing reliability. Thus, to provide meaningful restraints on growth of abusive governmental power, the remedy afforded to aggrieved citizens must be effective; i.e., it must make the victim whole and discourage future wrongdoing. In the final analysis, the disincentive to wrongful conduct that money damages provide is appropriate and socially wholesome — especially in the context of egregious

protests, appearances before planning and zoning bodies, zoning appeals, and particularly variance applications (i.e., variances have to be based on hardship), that the regulations may be economically draconian in their impact. Thus when they engage in constitutional wrongdoing, they do so with notice to a far greater extent than that given after the fact by Chief Owen (see 445 U.S. at 629), or that is afforded to public officials in the far more typical § 1983 cases in which compensatory (or even punitive) damages are awarded as a matter of course.

deprivation of constitutional rights. In contrast, sentencing the victim of governmental abuse to years of costly wandering through an administrative and judicial labyrinth, is no remedy; rather it rewards the constitutional wrongdoer by piling added burdens on the victim, while withholding and delaying effective relief.

The case at bench thus brings to the Court another instance suitable for invocation of the concepts of checks and balances. Here as elsewhere, a profession of noble ends does not justify employment of unconstitutional means. A government that would respond only to the self-serving call of politically popular, trendy notions abroad in its constituency, must still heed the stern call of accountability to the Constitution. In other words, popular cries uttered in the name of the environment, cannot, anymore than similar cries for "law and order", undo the idea that the Constitution and the rights protected by it — *including the rights of property* — are the supreme law of the land.

This is 1985 — not 1955. Rachel Carson's plea for the environment is no longer a lone cry in the wilderness. The environmental movement has come of age, and with it formidable array of sometimes onerous regulations imposed by powerful government bureaucracies. It is time to balance the scales; to recognize that with all the new found power goes responsibility to make whole the victims of occasional abuses.

The rigid absolutist dogma formulated by the California courts, that defies the Constitution and under all circumstances denies "just compensation" for this type of taking (but *de facto* fails to invalidate the governmental overreaching as well) is a regrettable case of confusion between the state police power and the power of a police state. It needs corrective intervention by this Court.

Amici curiae respectfully urge that the judgment below be reversed, and that the cause be remanded for a trial on the merits (*Cuyahoga River Power Co. v. Akron*, 240 U.S.

462 (1916), *Portsmouth Harbor L. & H. Co. v. United States*, 260 U.S. 327, 330 (1922)).

Respectfully submitted,

GIDEON KANNER

Attorney for Amici Curiae

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, December 19, 1985,

I served the within BRIEF OF AMICI CURIAE LODESTAR CO., ROBERT J. TROUTMAN, JR., AND THE GHERINI FAMILY, IN SUPPORT OF APPELLANT in re: "Macdonald, Sommer & Frates, etc. vs. The County of Yolo and The City of Davis" in the Supreme Court of the United States,

October Term, 1985, No. 84-2015; on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

HOWARD N. ELLMAN, KENNETH N. BURNS, SCOTT C. VERGES, ELLMAN, BURKE & CASSIDY, Suite 200, One Ecker Bldg., San Francisco, CA 94105;

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All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on December 19, 1985
at Los Angeles, California.

Kathleen Kattbach

AMICUS CURIAE

BRIEF

(11)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985
No. 84-2015

Supreme Court, U.S.
FILED

DEC 19 1985

JOSEPH F. SPANIOL, JR.
CLERK

MacDONALD, SOMMER & FRATES, a partnership,

Appellant

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS

Appellees

ON APPEAL FROM THE CALIFORNIA COURT OF
APPEALS

BRIEF OF AMERICAN COLLEGE OF REAL
ESTATE LAWYERS, AS AMICUS CURIAE IN SUPPORT
OF APPELLANT

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QUESTION PRESENTED

Whether a valid zoning regulation can effect a taking of private property for which just compensation must be paid under the Fifth Amendment of the United States Constitution

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Amicus Curiae has received the parties' oral consent to file this Brief and has confirmed the consent in writing by letters dated December 3, 1985, filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The purpose of the American College of Real Estate Lawyers, as stated in its Charter, is to

"gather together lawyers distinguished for their skill, experience and high standards of professional and ethical conduct in the practice of real estate law who will contribute . . . to the best interests of the Bar and general public, . . . to speak upon matters of interest and importance to real estate law and practice. . . ."

Accordingly, the College is interested in the outcome of this case because it concerns a fundamental constitutional question which has never been decided by the Court about private real estate property rights, as affected by zoning and similar land use regulations. That question is whether a land use regulation, valid on its face, can effect a Fifth Amendment taking for which just compensation should be available to the landowner. Because of the profound

constitutional issues involved, as well as the important practical ramifications for those persons particularly concerned with real estate law, the College submits its brief as amicus curiae in support of the Appellant.

PRELIMINARY STATEMENT

The issue before the Court is whether a municipality may be required to compensate a landowner whose property has been "taken" by excessive land use regulation (zoning or subdivision controls) through a procedure commonly referred to as "inverse condemnation" or a "de facto taking." This case arises from the all too familiar problem of zoning and other land use regulations that, through an excessive exercise of the police power, interfere with, rather than promote, the greater public good by severely and artificially limiting or prohibiting the construction of affordable and conveniently located housing through the working of market forces.¹

¹ A thorough analysis of the question and related issues is found in Bauman, The Supreme Court, Inverse Condemnation And The
(footnote continued)

At the time the Court upheld zoning as a proper government tool, the perception was that the inevitable course of unregulated real estate development would result in crowded, oppressive, mixed-use and unplanned growth. The laudable objective of zoning was to alleviate this perceived chaotic and uncontrolled development. Benefits would flow to the public and to individual citizens alike. Carefully controlled planning would assure that regulation would achieve the greatest public benefit without unduly burdening private property rights. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Because zoning was conceived as a means of preserving, or even enhancing real estate values, and of promoting the highest

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and best use of land,² the instant problem of zoning effecting a taking by substantially lessening property value and by opposing the highest and best use of land should ideally never have arisen. Since Euclid, however, the original purposes of zoning have all too often been corrupted.

Modern zoning regulations often differ greatly from their precursors which were generated out of the desire to bring order to the chaotic and unregulated growth of urban areas throughout the country.³ Not only is there little empirical evidence to support the Euclid rationale that zoning protects and

² U.S. Department of Commerce, Standard State & Zoning Enabling Act (1926) section 3 [Reported in R. Anderson American Law of Zoning, Section 30.01 (2d Ed. 1977)].

³ Heyman, Legal Assaults on Municipal Land Use Regulation, 5 Urban Law 2 (1973); Anderson, American Law of Zoning 2d, Section 8.01 at 5 (1976).

enhances property values,⁴ but there is great concern that land use regulation, as it has evolved in the almost six decades since Euclid, is increasingly being employed to hinder and, in some instances, to block the most economically efficient use of land.⁵

For example, in a leading decision striking down exclusionary zoning, in which a township in a rapidly developing South Jersey

⁴ Crecine, Davis & Jackson, Urban Property Markets: Some Empirical Results and their Implications for Municipal Zoning, 10 J. Law and Economics 79(1967); Reuter, Externalities In Urban Property Markets: An Empirical Test of the Zoning Ordinance in Pittsburgh, 16 J. Law Econ. 313 (1973); J. McDonald, Economic Analysis of an Urban Housing Market, 159-166(1979).

⁵ B. Seigan, Regulating the Use of Land in the Interaction of Economics and Law, 159, 162,163 (1977). See also, e.g. New York Times, 12/5/85, p.B1, "Westport [Connecticut] Striving to Restrain the Hands of Time," reporting a local effort to preserve the status quo by more burdensome zoning. A copy of the pertinent part of the Article is appended.

suburb of Philadelphia had rejected a development plan purportedly because the land was not served with sewer and water utilities, and could not, therefore, be developed without threatening the environment, the Supreme Court of New Jersey found, to the contrary, that the land was flat and readily amenable to such utility installation, and that the environmental protection rationale, under the circumstances, was merely a makeweight to support exclusionary housing measures or to preclude growth. Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I) 67 N.J. 151, 336 A.2d 713 (1975).

These extreme forms of regulation, generally enacted without regard for the health, safety and welfare of the community as a whole, frequently end up subsidizing

certain favored citizens at the expense of others who are either excluded by the lack of housing within their means, or who pay "premium" prices for the restricted housing supply which results from such regulation. This kind of zoning injures the public welfare by discouraging the productive use of land and by rewarding speculators in the "down-zoning game;" this results inevitably in a monopoly on new development and sharp inflation of land prices.

The public welfare is harmed when zoning hinders rather than helps efficient free market allocation of housing, employment, commerce, and production. Overly restrictive zoning results in forcing locally unpopular types of development to other municipalities or, alternatively, bestows on the governmental entity most of the bargaining

chips in negotiations with landowners seeking permission to develop their property.

A federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portent a long-term problem for the future unless major steps are taken." U.S. Department of Housing and Urban Development, Final Report of the Task Force on Housing Costs 4 (May 1978); see U.S. General Accounting Office, Report to the Congress -- Why are New House Prices So High, How are They Influenced by Government Regulations, and Can Prices Be Reduced? 41 (May 1978).

The Douglas Commission, in its exhaustive report to the President and Congress a decade and a half ago, found that certain zoning and other land use control abuses unnecessarily increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommendations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, Building the American City 18-19, 199-253 (specifically

206, 211-17, 224-26, 251) (1968). The Douglas Commission's findings were recently reemphasized and updated in the Report of the President's Commission on Housing 177-83, 199-200 (1982).⁶

The case now before the Court epitomizes these problems of land use regulation encountered regularly throughout the nation. It is a vivid, but not uncommon, example of narrow local interests serving themselves without regard for the property rights of the affected landowner or the broader public interest in an adequate supply of a variety of housing types, employment opportunities,

⁶ See also L. Sagalyn & G. Sternlieb, Zoning and Housing Costs (1973); S. Scidel, Housing Costs and Government Regulations (1978); Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 490 (1977); Roberts, An Appropriate Economic Model of Judicial Review of Suburban Growth Control, 55 Ind. L.J. 441, 461-64, 487-89 (1980).

and commercial enterprises. Notwithstanding the need for housing in the region surrounding Appellant's land (JA 44 at paragraph 10), the zoning of the Appellant's land for housing use (JA 44 at paragraph 8), the availability of roads, sewers, and water (JA 45-46 at paragraph 12), and the land's unsuitability for agricultural use (JA 45 at paragraph 11), Appellees have enforced a local government no-growth policy (JA 47 at paragraph 17) against Appellant by finally refusing to approve Appellant's subdivision plan for a new residential development in June, 1977. (JA 51 at paragraph 23).

For more than eight years this no-growth policy has held sway while Appellant's case has been pending, and the Appellees have, for all practical purposes, during that eight year period taken an open-space easement, at

the very least, in Appellant's land without paying any compensation.

The benefits of the Appellees' no-growth policy (whatever they may be) are being enjoyed by the local citizens, but the cost is being borne by Appellant alone. Given these circumstances, any remedy for Appellant that does not include compensation for its land, since the date on which it was rendered virtually worthless by Appellees' decision to apply a no-growth policy to it [JA 61 at paragraph 37), is not just and adequate. The Court must take this opportunity to address directly the nation-wide problem of no-growth, exclusionary land use regulation and once and for all dispel any lingering doubt that the Fifth Amendment mandate for payment of just compensation for all takings of

private property extends into the realm of land use regulation.

ARGUMENT

I. This Case Presents The Issues Of Exclusionary Zoning Which Can Result In A Taking

Many current zoning regulations and techniques are an outgrowth of the fear that the urban community is expanding and threatening to overwhelm the suburbs.⁷ Suburban leaders have often responded to this fear by using their discretionary zoning power in subtle and indirect ways to exclude minority and low and moderate income groups from their communities.⁸

The Supreme Court of New Jersey directly confronted the exclusionary zoning issue in

⁷ Anderson, American Law of Zoning 2d, Section 8.03(1976)

⁸ Symposium: Exclusionary Zoning, 22 Syracuse L. Review 465(1971).

Mount Laurel I, supra, and again eight years later in Southern Burlington County NAACP v. Township of Laurel (Mount Laurel II), 92 N.J. 158, 456 A.2d 390 (1983). That court has recognized that,

"almost every developing municipality acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing." Mount Laurel I, 336 A.2d at 723.

Against these restrictive practices, landowners seeking relief from the burdens of zoning ordinances which effectively take their property are, with few exceptions, limited to challenging the validity of the ordinance. The invalidation remedy, however, is often inadequate and incomplete,

relegating the property owner to the mercies of the offending municipality.

Because courts properly defer to the legislative body's discretion in enacting zoning, as in any exercise of the police power, see Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984); Euclid, supra, a heavy burden of proof (usually the mandamus test of "arbitrary, capricious and unreasonable action") is imposed upon the landowner who challenges a land use regulation, to overcome the presumption of validity. Protected from strict review by this judicial deference, municipalities can, with little effort, hide what is in reality a taking of property under the cloak of exclusionary zoning provisions that have the appearance of regulatory validity under ordinary police power doctrines.

At least in part, this ability to obscure "takings" by presenting them as reasonable land use regulation is an unfortunate consequence of the continuing confusion outside of this Court of two distinct issues; namely, substantive due process validity of an exercise of the state's police power (i.e. is it reasonably related to a public purpose?) and the taking question. As has been observed, regulatory validity and regulatory taking are distinct matters and are not mutually exclusive. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 647-653 (1981) (Brennan, J., dissenting). The fact that a regulation may be rationally related to promotion of health, safety and general welfare (i.e. is substantively valid) does not preclude the possibility that the regulation may result in the taking of

private property. Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 102 S.Ct. 3164 (1982). And conversely, the fact that zoning regulation may effect a taking does not necessarily mean that it is invalid, but only that just compensation is due under the Fifth Amendment. By carefully observing this distinction, two benefits will accrue. First, government can regulate land use in the public interest without fear of intrusive review by the courts, which should not become superzoning hearing boards.⁹ Second, the property rights of landowners will be more easily protected from uncompensated public taking, while at the same time remaining subject to all substantively valid public regulation.

⁹ E.g. Mt. Laurel II, supra, where the court has undertaken an elaborate procedure to review and remedy local zoning decisions.

Another inherent weakness with invalidation is that it is not an affirmative remedy, and a successful challenge will, thus, leave the landowner without any approved plan but still confronted by a municipality with the continuing power to rezone the land. Even after a court invalidates one ordinance, a municipality may very well continue to adopt prohibitory ordinances, one just as invalid as the preceeding illegal action.¹⁰ Thus, invalidation can readily deteriorate into a prolonged stalemate of repeated challenges and rezoning which serves only too well the exclusionary purposes of a "no-growth" municipality but does not provide an adequate

¹⁰ See San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 656 n.22 (1981)(dissenting opinion).

remedy for the landowner whose costs and expenses accrue inexorably.

An unfortunate example of this policy of bad faith rezoning can be seen in the Mt. Laurel cases mentioned above, where the Supreme Court of New Jersey initially said, "[W]e, the Court, trust Mount Laurel will amend its ordinance in the spirit we have suggested without judicial supervision." Mt. Laurel I 336 A.2d at 734. The same court, eight years later, was forced to conclude that, "our trust was ill-placed." Mt. Laurel II, 456 A.2d at 460. The municipality was still engaged in exclusionary zoning and its efforts to amend its zoning had been "little more than a smokescreen that attempts to hide the township's persistent intention to exclude housing for the poor." Id.¹¹

¹¹ A current overview of the still
(footnote continued)

Moreover, invalidation does not compensate the victorious challenger for the costs or for the interim loss of the full lawful use of his property. As a result, many landowners are either financially unable to protect their constitutional rights in property or, if able to do so, will pass the cost of victory along, thereby inflating housing prices, land costs, and rents.

Finally, invalidation does not provide an effective deterrent against regulation which constitutes a taking. This can be provided only by compelling the municipality to be concerned about potential financial liability and thus causing it to ensure protection from encroachment on protected rights. Owen v.

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unresolved problem of exclusionary zoning in New Jersey after Mt. Laurel, is found in "New Jersey's Struggle with Fair Housing," New York Times, 12/1/85, p.16E, a copy of which is appended.

City of Independence, 445 U.S. 622 (1980). A decision by this Court requiring compensation for excessive regulatory taking would not detract from a municipality's right to regulate reasonably, but rather would serve the salutary purpose of encouraging land use regulation to be enacted with an acute regard for the constitutionally protected rights of individuals.¹²

Divergent state and federal court interpretations have led to confusion on the question of whether compensation is ever allowed when a regulatory taking occurs (i.e., whether the doctrine of inverse condemnation should be engrafted upon our

¹² See Comment, Just Compensation of Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711, 724-32 (1982).

laws). All of those involved in land use matters, along with courts and commentators, are awaiting this Court's setting of guidelines for the resolution of this issue. Some courts have concluded that a majority of this Court will adopt Justice Brennan's dissent,¹³ while other courts have decided either that the majority will not adopt his position or that the Court has not yet

¹³ Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission, 729 F.2d 402, (6th Cir. 1984), rev'd on other grounds, 105 S. Ct. 3108 (1985); Martino v. Santa Barbara Valley Water District, 703 F.2d 1141, 1148 (9th Cir. 1983), cert. denied, 104 S. Ct. 151 (1983); Rippley v. City of Lincoln, 330 N.W. 2d 505, 511, N.D. (1983); Barbarian v. Panagis, 694 F.2d 476 (7th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), appeal dismissed, 455 U.S. 901 (1982), aff'd on remand, 699 F.2d 734 (1983); San Antonio River Auth. v. Garrett Bros. 528 S.W.2d 266 (Tex Civ. App. 1975).

squarely confronted the question.¹⁴ The resolution of so important a constitutional issue should not rest on mere conjecture engaged in by lower courts but rather should be based upon the solid authority of this Court's sanction.

A satisfactory resolution of this issue will not occur until this Court directly addresses and rules upon the basic issue of when regulation crosses over into the area of a compensable "taking." The establishment of when and whether inverse condemnation occurs will promote judicial efficiency by providing other courts with guidance as to what remedies are available for a government regulation that results in a "taking" of a

¹⁴ Citadel Corporation v. Puerto Rico Highway Authority, 695 F.2d 31, 33 at fn.4, 1st Cir. (1982); Aptos Seascape Corp. v. The County of Santa Cruz, 199 Cal. Repr. 191, 195 (1982).

landowner's property. The establishment by this Court of certainty about what remedies are allowed will permit interested persons, including Courts, municipalities, and landowners to focus on the fundamental issue of whether or not a particular zoning ordinance results in a "taking." Thus, until this Court resolves the issue, commentators and courts alike will continue to deal with the problem on an ad hoc basis without the benefit of authoritative guidelines, lawyers will continue costly litigation of the issue, and legislatures will continue enacting newer and more extensive regulations without, in many instances, considering their ultimate impact upon the landowner's private property interests.

Accordingly, we urge the Court to reach the merits of this case and, if necessary, to

adopt the reasoning of Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego 450 U.S. 621 (1981), consistent with the sentiments expressed by Justice Rehnquist in that case. Justice Brennan's reasoning provides not only a legally correct analysis of the "taking" issue but a practical and fair solution for all parties as well.

II. The Court Should Reverse the Lower Court's Decision that the Payment of Just Compensation for a Taking Effected by Zoning Regulations is not Required.

The decision below should be reversed because payment of just compensation to Appellant for the loss of the economically viable use of its land, as a direct result of land use regulations imposed by Appellees, is mandated both by the Takings Clause of the

Fifth Amendment and by the welfare of society as a whole.

The simple clarity of the Takings Clause has been obscured during the more than half-century of development of the zoning laws since the Court in 1926 approved the zoning power in Euclid, supra. This has been exacerbated by the fact that the Court has thereafter essentially fallen silent and has left the determination of these matters to the state courts. Without the benefit of any further decision by the Court applying the Takings Clause to zoning and similar land use controls, state courts have held that the only remedy generally available to correct a burdensome land use regulation is invalidation, and that just compensation is never required because invalidation is

adequate to protect the property rights of the landowner.

The Fifth Amendment, however, is unequivocal in requiring that no private property may be taken unless just compensation is paid. It establishes both the right and the remedy, which properly interpreted, should leave no room for the argument that the right may be protected by other remedies chosen at the state's discretion. As Justice Rehnquist said, the constitutional meaning of "just compensation" is the "full and perfect equivalent for the property taken." Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (dissent). While invalidation can often be an adequate and full remedy, as a full and practical matter, this is often not so. Therefore, just compensation must always be

available, as in this case, to protect the landowner against takings effected by land use regulations.

Property rights deserve no less protection than personal rights, because they are so interdependent as to be one and the same. As this Court has said:

"Property does not have the rights, people have the rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is, in truth, a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Finance Corp., 405 U.S. 538, 522 (1972).

This admonition, that personal and property rights are inseparable, is confirmed by the exclusionary impact of some land use regulations on the rights of persons who are unable to afford or to maintain a single-

family house on a large lot, or on persons who can only afford lower-cost housing such as apartments, attached houses, or mobile homes. These considerations are augmented by evaluation of the impact on the location of places of employment as well as the impact of the kinds of employment available in a community.

Just as the rights of persons to be free from illegal search and seizure and involuntary confessions are not protected solely by the exclusionary rule, but are also protected by the right to seek compensatory damages,¹⁵ so the right to be free from uncompensated taking of property should not

¹⁵ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Unlike *Bivens*, however, where the Court had to fashion a damages remedy for violation of the Fourth Amendment, the Framers of the Constitution established the "just compensation" remedy for public takings of private property.

be protected solely by invalidation, but should also be protected by compelling the payment of just compensation.

The Takings Clause, like the other constitutional protections, must be interpreted and applied in order to achieve its true purpose, which is to insure that the majority act with fairness and justice when imposing any burden on the individual citizen and not in a formalistic or doctrinaire fashion that sacrifices fairness and justice for expediency or mechanical application of legalistic labels. The Takings Clause is intended to:

"bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as whole." Armstrong v. United States, 364 U.S. 40,49 (1960).

The argument, that the potential for liability for an award of just compensation

for a regulatory taking is inimical to effective land use regulation for the public good,¹⁶ only emphasizes the wisdom of Justice Holmes' warning in Pennsylvania Coal Co. v. Mahon, 2650 U.S. 393 (1922) against succumbing to the temptation to excuse violation of the Takings Clause by resort to the police power justification. He said, referring to it:

"When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of

¹⁶ In fact, the availability of a compensation remedy for temporary takings should lead to more efficient land regulation. See Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Calif.L.Rev. 569,572,582,623-24(1984).

paying for the change." Id. at
415-416

The court below erred in this case by dismissing Appellant's claim for just compensation for the taking caused by subdivision regulation. The decision is not consistent with this Court's holding that valid regulations can, as applied to specific property, result in a taking of that property, or some part of it, for which just compensation is mandated by the United States Constitution. The issues presented on this appeal afford the Court a unique opportunity to remove any doubt that the just compensation remedy, expressly held to be available in other regulatory settings, is also available where land use regulations are involved.

Up to this time the Court has declined to decide whether zoning regulations can result

in a compensable taking (inverse condemnation) when this question has been presented previously. Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal Rptr. 372 (1979), aff'd on other grounds, 447 U.S. 225 (1980) (no application for approval, thus no taking); San Diego Gas & Electric Co., supra, (no final decision below, thus not reviewable); Williamson County Regional Planning Commission v. Hamilton Bank, 105 S. Ct. 3108 (1985) (where the Court discussed various ramifications of the problem but found that under the facts presented it was unripe for resolution).

The Court however, has given every indication that land use regulations can result in takings for which just compensation should be required. Justice Brennan, speaking for four members of the Court in

dissent in the San Diego case,¹⁷ and addressing squarely the issue of compensable land use regulatory taking, which the majority did not do, held that invalidation was not the exclusive remedy and that an otherwise valid regulation can, under a particular set of facts, effect a taking for which just compensation is required by the Fifth Amendment. In his review and analysis of the taking and property regulation cases, Justice Brennan correctly found that the Court has repeatedly acknowledged that regulation can effect a Fifth Amendment taking.

¹⁷ In addition to the three Justices who joined his dissent, Justice Rehnquist, although voting with the majority on the issue of finality, stated that he "would have little difficulty agreeing with much of what is said in this dissenting opinion of Justice Brennan." 450 U.S. at 633-34. This would seem to be tantamount to a majority in support of Justice Brennan's views.

More significant, however, is his observation that a regulatory taking and an eminent domain taking are not basically different in kind, but are essentially similar exercises of governmental control over property. San Diego, 450 U.S. at 651. Stated differently, it is of no help in analyzing whether a compensable taking has occurred, to categorize the government action as "regulatory" or "eminent domain" because these are merely convenient, and often misleading, labels for exercises of the government's police powers. Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321, 2329 (1984). Since any exercise of police power must meet the substantive due process test of substantial relationship to the promotion of the public health, safety and general welfare, there is always a threshold question

of validity, but it is not the end of the inquiry, for,

"If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." San Diego, supra, 450 U.S. at 656 (Brennan, J., dissenting).

Because a finding that a regulation is substantively valid has only an effect similar to a finding that an eminent domain action is for a valid public use, it follows that such a finding of regulatory validity does not answer, but instead begs, the question of whether a taking has been effected. In other words, where a landowner is regulated by valid laws, just compensation may still be necessary if the regulatory effect on the land constitutes a de facto

taking. San Diego, supra, 450 U.S. at 656 n.23 (Brennan, J., dissenting).

Refusal of the court below to follow the consensus of the Court, as enunciated by Justice Brennan, that a valid land use regulation could result in a compensable taking, does not appear to be justified.¹⁸ Recently, in an unanimous opinion in a straight condemnation case, the Court observed:

"We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth

¹⁸ E.g. footnote 17, supra, concerning Justice Rehnquist's agreement with most of Justice Brennan's dissent. Justice Stevens has now lent his voice to the proposition that a valid and use regulation may require just compensation, Williamson County Regional Planning Commission v. Hamilton Bank, 105 S.Ct. 3108 at 3125 (1985) (concurring opinion).

Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property, thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived 'an owner economically viable use of his land.'" Kirby Forest Industries. v. United States, 81 L.Ed.2d 1,13 (1984).

In a recent case this Court upheld a landowner's claim for compensation for the burden imposed on her apartment building by a state law regulating the relationship among landlord, tenant, and cable television company. The Court rejected the New York Court of Appeals' traditional analysis that the regulation was a legitimate use of police power precluding just compensation. The Court held that although the regulation was valid,

"It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be

paid." Loretto v. Teleprompter
Manhattan CATV Corp., 458 U.S. 419,
425 (1982).

This Court has likewise pointed out, in
upholding the enactment of the Federal
Surface Mining Control and Reclamation Act,
providing for regulation of surface mining,
that:

"A statute regulating the uses that
can be made of property effects a
taking if it denies an owner
economically viable use of his land
. . . ." Hodel v. Virginia Surface
Mining and Reclamation Association,
452 U.S. 264, 296 (1981).

If the Court does not intend the
foregoing to be applied in the courts of this
nation in land use regulation cases wherein
compensation is sought, then it should say so
now. The Court should take the opportunity
presented in the instant case to put to rest
any lingering doubts about the availability
of just compensation for takings brought

about by excessive land use regulations and should reverse the decision of the court below.

CONCLUSION

A remedy awarding "just compensation" would provide the following advantages: it would implement the purpose of the Fifth Amendment, achieve a "fair" outcome, reduce pressures on landowners and courts to use the drastic invalidation remedy to upset comprehensive land-use planning schemes and encourage planning officials to weigh carefully the costs, as well as the benefits, of restrictive land use regulations. On the other hand, this remedy would not chill the government's ability to regulate; rather it would encourage the government to make a more careful, more thorough cost-benefit analysis

of the overall impact of the contemplated regulation. The principle enunciated by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, supra, that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter way than the constitutional way of paying for the change" is just as applicable today.

Respectfully submitted,

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The Region Continued

New Jersey's Struggle With Fair Housing

By ANTHONY DePALMA

FOR 15 years, New Jersey and its municipalities have been grappling over how to provide low-cost housing in the developing suburbs, where most new jobs are and where many people want to live. Most suburban communities, for their part, have tried to maintain traditional zoning, requiring large building lots and minimum house sizes. They did so, local officials have said, to preserve their communities' character. But such zoning also guaranteed that housing would be expensive, and thus many suburbs were closed to low-income and moderate-income people.

Exclusionary zoning has been challenged in other states, but nowhere have the courts stepped in as they have in New Jersey. First in 1975, then in stronger terms in 1983, the State Supreme Court ruled unconstitutional the zoning in Mount Laurel, a township in Burlington County east of Camden, without a main street, a supermarket or, until recently, its own post office.

Each time, the court said municipalities cannot use zoning to keep out the poor, and must provide their fair share of housing opportunities for all classes of people. In 1983, after communities had dragged their heels, the court employed the profit motive to correct the social imbalance. It introduced something called "the builder's remedy," which allowed developers to build more houses if they sold at least 20 percent of the units at reduced prices to low-income and moderate-income families.

Many communities have resisted the Mount Laurel decisions because of the economic and social issues they raised. There has also been a political backlash. Critics contend that the court overstepped its authority, taking over what was once considered solely a municipal responsibility. The court said the need to provide housing for all people was so important that it was willing to act if the Legislature and the Governor were not.

Finally, in July, the Legislature responded. It established the Fair Housing Council to help municipalities determine what their fair share of low-cost housing should be. The Legislature also made \$125 million available to subsidize the construction and rehabilitation of low-cost residences. Proponents say the council, which is just beginning to draw up guidelines, will produce affordable housing. But others view the panel as simply another layer of bureaucracy, one that is likely to allow

many municipalities to delay settling housing cases for years, and perhaps to wriggle out of their fair-share obligations altogether.

The Supreme Court has decided not to hand over to the council about a dozen longstanding cases. To force the court out of the housing business, some legislators have begun drafting bills to change the State Constitution. They have the support of Governor Kean, along with 766,000 voters who, in separate nonbinding municipal referendums on Nov. 5, supported such an amendment.

The long legal battle has bruised relations between the Legislature and the courts, split cities and suburbs and heightened tensions between the state's haves and have-nots. And while the struggle has not yet resulted in the building of much low-cost housing, it has at least produced a resolution in the township where it all began. Under a settlement, Mount Laurel officials recently agreed to accept more than 1,000 lower-priced houses and more than 900 prefabricated ones. Many municipalities still must come to grips with the court's dictates. Each faces different pressures and needs. Here is a look at the different ways in which three communities responded.

Buying Time and Resisting Change

CRANBURY, N.J. — This township is an anomaly in Middlesex County. Off Exit 8A of the New Jersey Turnpike, not too far from the office developments that have sprouted along Route 1 between Princeton and New Brunswick, Cranbury remains a quiet community surrounded by 13 square miles of farm land, much of it in potatoes, grain and soybeans.

In 1974, the Urban League of Greater New Brunswick sued Cranbury, along with most Middlesex municipalities, contending that its one-acre zoning and other restrictions had denied low-income and moderate-income people an opportunity to live there.

Township officials argued that any drastic changes would harm the community's character, and they set out to demonstrate just how unusual it was, lobbying suc-

cessfully to place the village center on the National Register of Historic Places and designating about half the township as an agricultural preservation area.

But in 1983 four developers who wanted to build in Cranbury joined the Urban League suit, seeking the builder's remedy. Their proposals total 4,200 units; Cranbury now has fewer than 800 houses.

Local officials, led by Mayor Alan A. Danser, a young potato farmer, contended that the municipal water, sewerage and traffic control systems would be impossibly overburdened. Their objections notwithstanding, the Supreme Court appointed an arbiter, called a master, to oversee Cranbury's rezoning. Township officials have cooperated, largely because they had no choice, accommodating most of the growth by rezoning the area nearest the turnpike. Much of that is farm land, including a sizable parcel owned by the Mayor's father.

Although it has rezoned, Cranbury has not given up. Township officials have applied for a transfer of their case from the court-appointed master to the new Fair Housing Council. They believe the council would be more likely to respect the agricultural preservation district and historic area as legitimate reasons for reducing Cranbury's housing obligations. However, the Supreme Court has refused to give up the case.

The resistance to the Mount Laurel decisions by Cranbury's leaders has not been as colorful or obstinate as some — the Mayor of neighboring Monroe Township has vowed to go to jail rather than rezone — but the results have been the same. In the 11 years since the Urban League suit was filed, only four low-cost houses have been built in Cranbury.

A Borough Decides To Build on Its Own

BERNARDSVILLE, N.J. — Tucked in the Somerset Hills, this borough has been blessed with an abundance of open space and people rich enough to protect it.

Unlike many of its neighbors in Somerset County, Bernardsville never opened its borders to corporations relocating along the interstate highways. Nonetheless, the demand for housing was tremendous.

In 1984, a local landowner proposed building 170 town houses on eight and a half acres near the village center. The owner eventually went to court, where Judge Eugene Serpenteelli, one of three judges appointed by the Supreme Court to hear all Mount Laurel zoning cases, authorized the building of 76 town houses, 20 percent of them to be set aside for low-income and moderate-income families.

"That was resolved, but the borough still felt in an uncertain position," said Robert J. O'Grady, Bernardsville's planning consultant. Until it had a master plan that incorporated its obligation to build low-cost housing, Bernardsville was vulnerable to similar suits by other developers.

Using a court-accepted formula, local officials determined that the borough's fair share amounted to 290 units, including some existing houses. But to entice developers to build low-cost housing, officials would have been forced to permit them to construct four market-rate units for each low-cost one; the profits from the full-price houses would have subsidized the others. The net result: Bernardsville would have had to accommodate nearly 1,000 new units, almost doubling its housing stock.

Many residents believed that such explosive growth would have destroyed Bernardsville's character and se-

verely strained its municipal resources.

But the borough came up with an alternative — to build only the low-cost housing. Bernardsville will sell bonds, using the revenue to subsidize each house. Local officials calculate that this will add about 25 cents to the tax rate, now \$2.09 per \$100 of assessed value. In the end, Mayor Peter S. Palmer said, taxes will be no higher than they would have been if 1,000 houses had been built and the necessary municipal services added.

No other jurisdiction has followed Bernardsville's example. The reason, said Mr. O'Grady, is political.

"The governing bodies don't feel they should get into the housing business," Mr. O'Grady said, "and the residents don't want to see their tax dollars going into subsidized housing."

The First Phase Of a Fair Share

BEDMINSTER, N.J. — A township with a patrician tradition and a good deal of empty land, Bedminster came to symbolize both resistance to low-cost housing and, ultimately, acceptance of the Supreme Court's decisions.

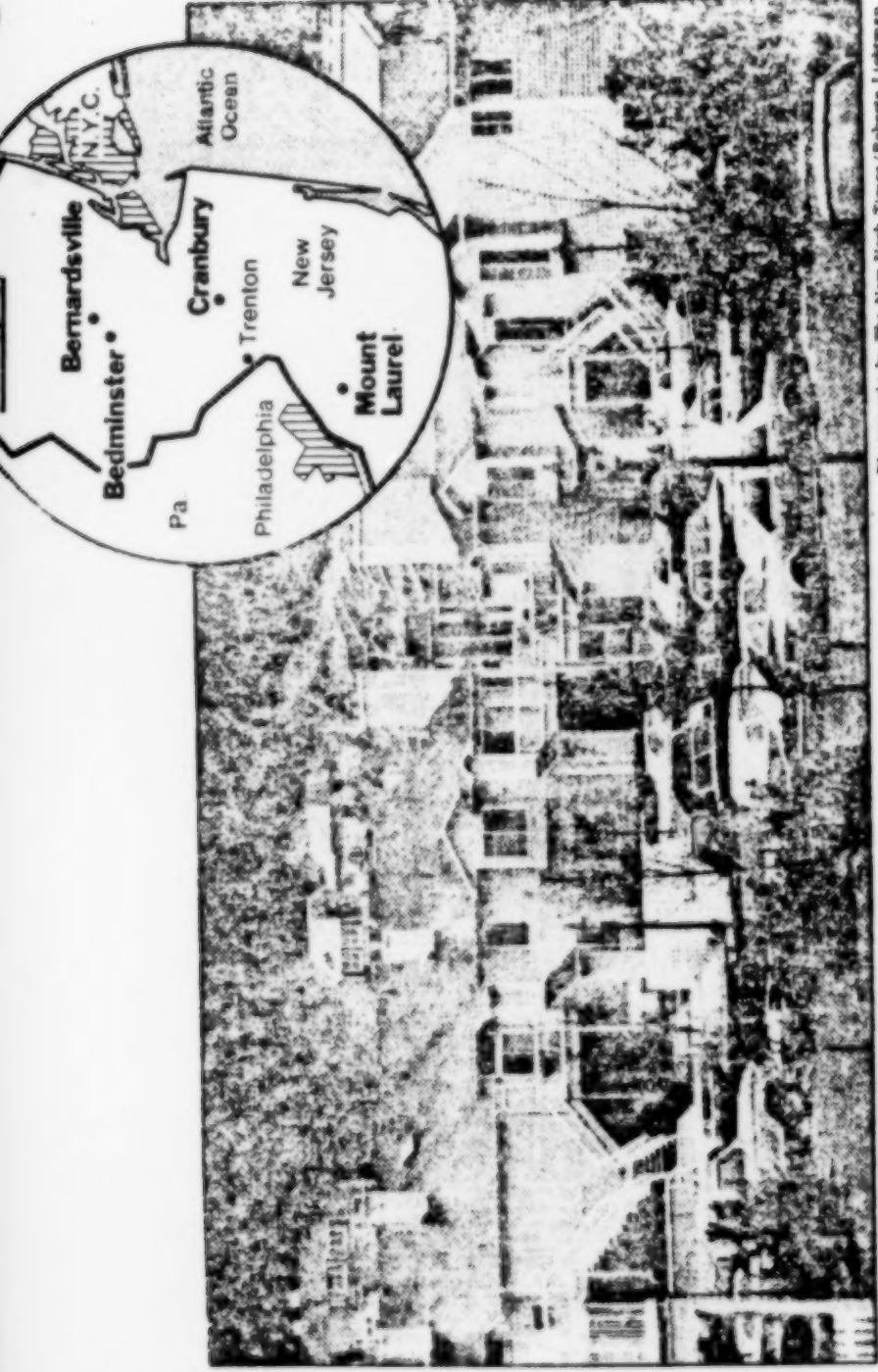
The legal dispute here began in 1969, before the first Mount Laurel ruling, and was instituted by the Allan-Deane Corporation, a subsidiary of the Manville Corporation. Allan-Deane had purchased 1,500 acres in Bedminster and adjoining Bernards Township. Most of Bedminster was zoned for lots of five acres or more, but Allan-Deane had something else in mind: a new community covering a mountainside. The proposals, which changed over time, ranged from 500 single-family homes to enough housing for 14,000 people.

What resulted was a no-holds-barred legal joust. According to Alan Mallach, a planner who has been involved in the case for many years, both Bedminster and Allan-Deane set out to spend whatever it took to win. "It was like two heavily armored knights slogging away at each other," he said.

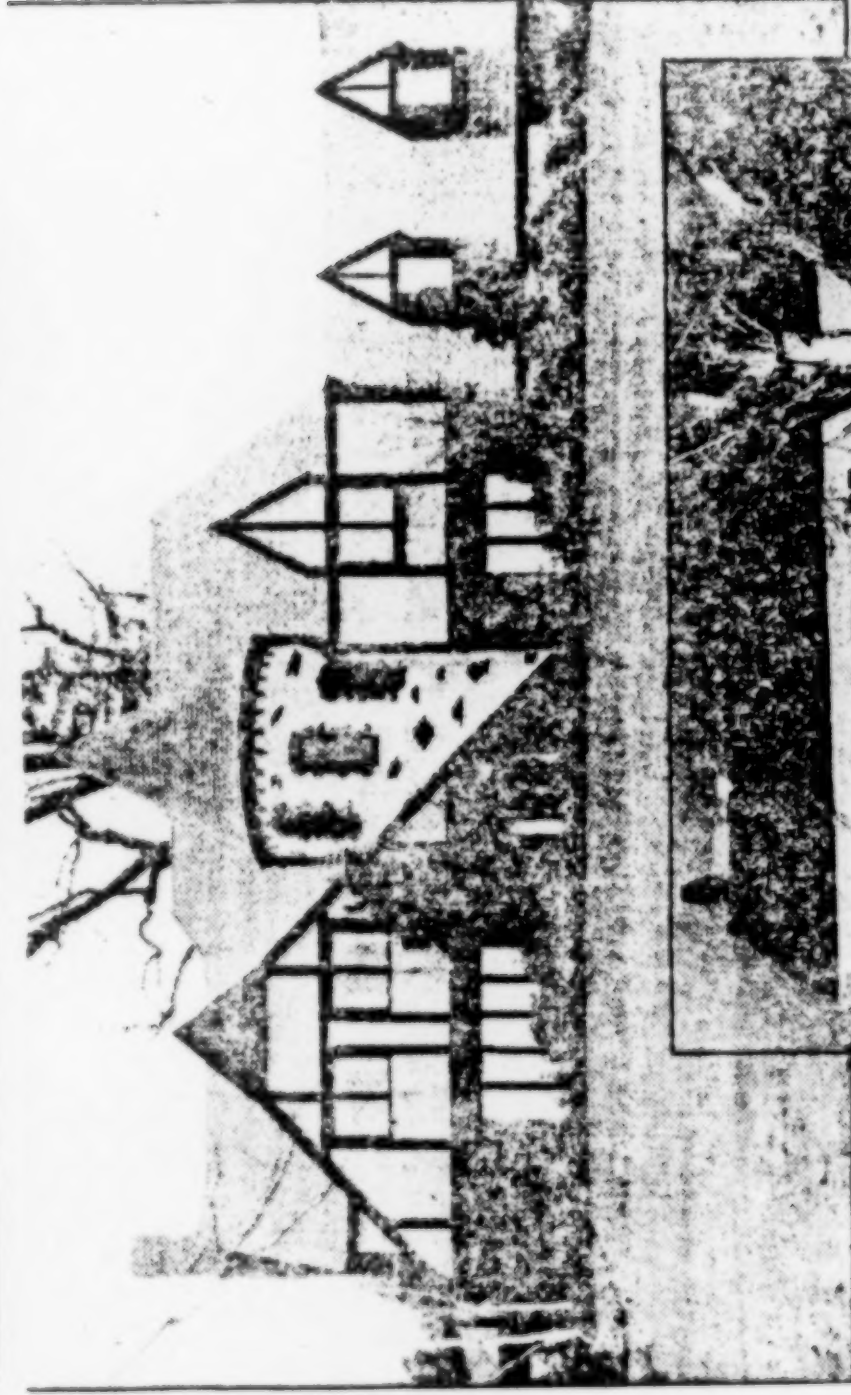
Bedminster contended that its semi-rural character would be ruined by such a huge development, though, in the early 1970's, the township welcomed the headquarters of A.T.&T. Long Lines and its 3,500 employees. There were also environmental concerns: Bedminster argued that runoff from the development would harm trout in the Raritan River, Mr. Mallach said. Allan-Deane countered with a computer model of the runoff that suggested its effect on the trout would be minimal.

Bedminster took the case as far as the United States Supreme Court, but to no avail. By the time the second Mount Laurel decision was handed down in 1983, the township had worked out a plan for the site. Allan-Deane was allowed to build more than 1,200 units, if 20 percent were set aside and subsidized; 260 town house apartments in the first phase of The Hills, as the development is known, have been sold to low-income and moderate-income families.

A nonprofit housing corporation screened hundreds of applicants and selected those allowed to buy the units for \$26,500 to \$55,500. Comparable housing in The Hills sold for as much as \$99,000. A survey of the first 200 buyers showed that most were employed in the area as clerks, waitresses, computer operators and teachers. Bedminster's overall Mount Laurel obligation was determined to be about 800 units, most of which will be built on land controlled by Allan-Deane. Construction of the next 180 low-cost units is scheduled to begin by next summer.



The Hills, a town house development, has transformed the suburban community of Bedminster, N.J.



Towns like Bernardsville with large estates (above) and communities like Cranbury with working farms (at right) have been ordered to rezone for low-cost housing.



Westport Striving to Restrain the Hands of Time

By DIRK JOHNSON

Special to The New York Times

WESTPORT, Conn., Dec. 4 — In the 1955 novel "The Man in the Gray Flannel Suit," this town served as the archetypical "bedroom community" for striving young executives with jobs in the New York City and children in school.

The Talk But Tom Rath, the story's harried hero, no longer would need to depart each morning on the 7:40 train for the city. Instead, he could probably find work right here.

Indeed, workers commuting to Westport now outnumber those leaving. Since 1972, commercial development here has nearly tripled — even though the population has remained at about 25,000 — and some residents are fearful of losing the small town charm.

"The whole nature of the town has changed," said Sidney B. Kramer, leader of a group called Save Westport Now. "We don't want to become another Stamford — a little city dominated by office buildings."

A proposed moratorium on further commercial development goes before the town's planning and zoning commission tomorrow. If approved, the town would reject new building proposals for the next nine months, while the commission tightens its zoning codes.

"Condos, we're getting condos —

an abysmal addition to the landscape," said Mr. Kramer. "And the traffic. On some days, cars are backed up from the Merritt Parkway clear to Duck Pond Road."

Mr. Kramer, owner of the Remarkable Book Store, said the building boom has driven rents so high that few independent shops can afford to stay.

Kojak the Tallor and Welch's Hard-

ware have been forced to close, he said, while Main Street has become dominated by corporate owned stores, such as Laura Ashley and Le Must de Cartier.

Meanwhile, four elementary schools have closed since 1978, in part because housing prices have soared beyond the reach of many young couples with children. "It's not the small

town of 30 years ago," Mr. Kramer said.

"We can't turn back the hands of time," countered Anthony Slez Jr., an attorney and Westport native who opposes the moratorium. "I can remember when this town was so small you could sneeze in Saugatuck and somebody in Groves Farms said, 'God bless you,'" he said, referring to two different neighborhoods in town.

"But let's be fair," he added. "Are we going to blame the owners of commercial property?"

Mr. Slez, a third generation Westporter, believes the moratorium is the work of newcomers who arrived in town with fixed notions of Westport as "a quaint little rural town" and become disenchanted to find it's a bustling little metropolis.

As a boy working at his father's gas station, Mr. Slez said he remembered New Yorkers stopping to ask for "directions to the artist's colony."

"I guess," he laughed, "that they thought there was an actual compound for the artists."

AMICUS CURIAE

BRIEF

124
No. 84-2015

Supreme Court, U.S.

FILED

DEC 20 1985

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, A PARTNERSHIP,
APPELLANT

v.

THE COUNTY OF YOLO AND THE CITY OF DAVIS

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA, THIRD JUDICIAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether in its present procedural posture appellant's claim of a "taking" of its property without just compensation, in violation of the Just Compensation Clause of the Fifth Amendment, is ripe for decision by this Court.

2. Whether appellant has a cause of action for money damages, either directly under the Just Compensation Clause or under 42 U.S.C. 1983, for an alleged "taking" of its property without just compensation as a result of the County's denial of its subdivision proposal.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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MACDONALD, SOMMER & FRATES, A PARTNERSHIP,
APPELLANT

v.

THE COUNTY OF YOLO AND THE CITY OF DAVIS

*ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA, THIRD JUDICIAL CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case raises important questions concerning (i) when a claim of a "taking" of property as a result of the action of an administrative agency is ripe for judicial consideration, and (ii) whether a governmental entity may be required to pay compensation for the period of time between when a regulatory measure becomes final and when the regulatory measure is enjoined as an unconstitutional taking of property without just compensation. The Court's decision therefore may have a significant impact on the administration of federal regulatory programs affecting land or other property interests.

STATEMENT

Appellant MacDonald, Sommer & Frates, a partnership, is the owner of two contiguous tracts of land in Yolo County, California. Appellant brought this action

seeking a money judgment for an alleged "taking" of appellant's property after the County's Board of Supervisors rejected its proposal for the subdivision of one of the two tracts. The Superior Court for Yolo County sustained a demurrer to the fourth amended complaint (J.A. 99-110), and the Court of Appeal affirmed (J.A. 115-126). The statement of facts therefore is drawn principally from the fourth amended complaint (J.A. 42-82).

1. One of appellant's two parcels, which it purchased in 1971, is an irregularly shaped tract that consists of a large rectangle and a smaller rectangle protruding from it to the west (J.A. 43). The boundary of the City of Davis falls at the westernmost edge of the smaller rectangle (J.A. 67). Since 1966, this property has been zoned for single and multi-family residential use, and it is so described in the County's General Plan (J.A. 44).¹ The area immediately to the south of the larger rectangle contains a golf course surrounded by single family residences. However, the other adjacent lands have not been developed. The land to both the east and west is under cultivation, and the property to the north is owned by the State Division of Forestry. Appellant's second parcel is a long, thin rectangle that is essentially a westerly extension of the protruding rectangular portion of the 44-acre tract. This 15-acre parcel is located entirely within the City of Davis. At its western edge is the current terminus of a public street known as Cowell Boulevard. J.A. 43, 44, 67.

¹ Under California law enacted in 1965, the legislative body of each county and city must adopt "a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside of its boundaries which in the planning agency's judgment bears relation to its planning." Cal. Gov't Code § 65300 (West 1983). State law prescribes certain mandatory features of such plans and detailed procedures for their adoption. See *id.* §§ 65300-65361.

2. In April 1975, appellant submitted a tentative map to the Yolo County Planning Commission for a proposed subdivision of the 44-acre tract into 159 single and multi-family lots (J.A. 49).² Under California's Subdivision Map Act, approval of such a tentative map is the first step in subdividing property for residential development. Cal. Gov't Code § 66452 (West 1983). The map indicated that access to the proposed subdivision would be provided by extending Cowell Boulevard from its existing terminus in the City, across appellant's 15-acre strip, and into the subdivision—a distance of about 1300 feet (J.A. 77).

3. The Planning Commission denied the tentative map, and the Board of Supervisors, after a hearing, sustained that denial (J.A. 71-80). In its notice and findings, the Board determined that the proposal was inconsistent in a number of respects with the requirements of the County's General Plan that development shall be "sound and orderly" (J.A. 73).

a. The Board first concluded that the proposal was inconsistent with the purpose of the General Plan "to prevent the piecemeal development of subdivisions within agricultural zones which results in the impossibility of economically farming the remaining parcels" (J.A. 73). The Board found that appellant's 44-acre tract "is located within an area of prime agricultural land," although it acknowledged that the character of the soil on appellant's tract was "impaired" by the sale of some of the soil (apparently in the 1960s) for the construction of

² The tentative map indicated that 23.99 acres were zoned "R-1" under the Yolo County Zoning Ordinance (which provides for a principal use of one single-family dwelling per lot); 3.4 acres were zoned "R-2" (one single-family or duplex dwelling per lot); 2.11 acres were zoned "R-3" (one single family duplex dwelling or rooming house per lot); and 3.56 acres were zoned "R-4" (one professional-services building or multi-family dwelling, up to four stories tall, per lot). The map showed 143 R-1 lots, 12 R-2 lots, three R-3 lots, and one R-4 lot. The Zoning Ordinance generally provides for a minimum lot size of 6000 or 7000 square feet in those four classifications. See J.A. 67, 131-137; 1 Supp. C.T. 58-65.

Interstate 80 (J.A. 74; see J.A. 45; Appellant's C.A. Br. 2 n.2). The Board noted that the closest developed parcel to the west of appellant's tract was separated by a 56-acre parcel that was under cultivation. In the Board's view, appellant's proposed subdivision would render the cultivation of those intervening 56 acres economically infeasible because dust, pesticides, and crop dusting operations would become a nuisance to the residents of the subdivision. J.A. 73-74.

b. The Board next found the proposal to be inconsistent in several respects with the requirement of the County's General Plan that "the spread of development shall be controlled to provide for efficient services to developments by community facilities and utilities" (J.A. 73):

First, the Board noted that the County Code sections implementing the General Plan require that there be adequate provision for ingress and egress for every subdivision. The only access to the subdivision shown on the tentative map appellant submitted was by way of an extension of Cowell Boulevard across appellant's 15-acre strip in the City of Davis. However, the City had reported to the Board that it would not accept dedication of the proposed extension of Cowell Boulevard as a public City street or enter into an agreement with the County or a special district to allow maintenance of Cowell Boulevard within the City.³ The Board therefore found that the proposed subdivision did not comply with provisions of the Yolo County Code that require each parcel of a subdivision to be served by a public street. The Board further found that the extension of Cowell Boule-

³ The City apparently took this position because the extension of Cowell Boulevard to appellant's property was inconsistent with the City's General Plan, which designated appellant's property for agricultural use. J.A. 118; C.A. App. 1583. See note 1, *supra*. Under California law, no real property in an area covered by a general plan may be acquired, by dedication or otherwise, until the planning agency has reported upon its consistency with the general plan. Cal. Gov't Code § 65402 (West 1983).

vard as a private road would not comply with the County Code requirement that there be adequate ingress and egress for a subdivision. J.A. 74-75.

Second, the Board found that although the tentative map contemplated that sewer service would be furnished by the El Macero Interceptor Sewer Line on the easternmost boundary of the proposed subdivision, the conditions necessary to connect to that line had not been satisfied. The Board explained that County Agreement 75-97, which governs the use and operation of the line, requires that before any new connection to the line can be approved by the County, the area to be served would have to be annexed to the El Macero County Service Area. That annexation, the Board pointed out, was "subject to Local Agency Formation Commission [LAFCO] jurisdiction,"⁴ and there were "no proceedings currently pending before LAFCO for the annexation of the proposed subdivision" (J.A. 75).

Third, the Board found the tentative map deficient with respect to the provision of other services as well. For example, the Board noted that appellant's proposal did not provide for the furnishing of water or maintenance of a water system by any governmental entity (it instead contemplated water service by a private water company), and that there was no provision for parks and recreational facilities or for the maintenance,

⁴ California law establishes a LAFCO in each county, consisting of two members of the county's board of supervisors, two members representing the cities in the county, and a fifth member representing the public. Cal. Gov't Code § 54780 (West 1983). The LAFCO is charged with planning for the logical and reasonable development of local governments in the county, including the determination of each such entity's "sphere of influence"—which is defined to mean a "plan for its probable ultimate physical boundaries and service area" (*id.* § 54774). The LAFCO has the authority, *inter alia*, to approve or disapprove the incorporation of cities, the formation of special districts, and the annexation of territory to existing local agencies. *Id.* § 54790. See generally *id.* §§ 54790.1 *et seq.*

lighting and cleaning of Cowell Boulevard or the streets in the subdivision. J.A. 76. Similarly, the Board found that the County Sheriff's Department, which has law enforcement jurisdiction of the site, was not capable of furnishing the level of police protection required for the subdivision. J.A. 76.

c. Finally, the Board concluded that the limited access to the subdivision afforded by the proposed 1300-foot extension of Cowell Boulevard "constitutes a real and substantial danger to the public health in the event of fire, earthquake, flood, or other natural disaster and could render said subdivision inaccessible in said event" (J.A. 77).

3. On October 13, 1977, appellant filed a petition in the Superior Court against the County and City for writs of administrative mandamus. *MacDonald, Sommer & Frates v. County of Yolo & City of Davis*, No. 36657 (Yolo City Super. Ct.). An amended petition was filed on January 23, 1981 (J.A. 21-33), and is still pending (J.A. 121). In the amended petition, appellant contends, inter alia, that the County acted in contravention of its General Plan and zoning ordinance and that the alleged restriction of appellant's property to agricultural use and denial of access to the property resulted in a taking of property without compensation, in violation of the United States and California Constitutions. Appellant seeks an order setting aside the June 14, 1977 decision denying appellant's tentative subdivision application and directing the County to reconsider that application. C.A. App. 597, 601.

4.a. On the same day that appellant filed its petition for a writ of mandate (October 13, 1977), appellant also filed the instant suit in the Superior Court (C.A. App. 1-20). After demurrers to the original and several amended complaints were sustained, appellant filed its fourth amended complaint on October 15, 1981 (J.A.

42-66).⁶ Appellant maintained that in denying its subdivision proposal, the County had determined that the property could be used only for agricultural purposes (J.A. 51). Appellant alleged that the City had contributed to the County's determination by (i) representing to the City that the parcel was designated as an agricultural reserve on the City's General Plan; (ii) refusing to accept annexation of the parcel or to furnish other City services to it; (iii) refusing to accept dedication of Cowell Boulevard or to permit it to be maintained by the County or private parties; and (iv) approving another subdivision adjacent to the City that would be annexed to the City and have a road configuration that would deprive appellant of access to public streets. Appellant further alleged that although the City purported to be acting pursuant to a policy of preserving prime agricultural land and preventing developments for which there were no immediately available City services, the City and County had permitted and facilitated other developments. Thus, appellant contended, their positions regarding appellant's property were "inconsistent, discriminatory, arbitrary and unreasonable" (J.A. 49-50). Appellant further alleged that the County had "unlawfully delegated its planning and land-use regulatory functions and responsibilities to [the] City, and [had] unlawfully abrogated its own General Plan and zoning ordinances" (J.A. 50).

As relief, appellant sought, inter alia, "damages in inverse condemnation," on the theory that the restrictions were imposed upon its property for the public purpose of creating an open space area for the use, benefit and enjoyment of the City and County. In appellant's view, this action amounted to a taking of property for a

⁶ Appellant originally sought to consolidate the mandate action with the instant suit, but the court denied that motion on January 9, 1978 (C.A. App. 117), apparently because of differing standards of review in the two proceedings (*id.* at 109-114).

public purpose without compensation, in violation of Article I, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. In addition, appellant sought damages against the City and County under 42 U.S.C. 1983 for an alleged taking of its property without just compensation. J.A. 65.⁶

b. The Superior Court sustained the demurrers filed by the County and City (J.A. 99-110), and the California Court of Appeal affirmed (J.A. 115-126). At the outset the Court of Appeal stated its holding "that the complaint does not allege facts sufficient to constitute causes of action in inverse condemnation, denial of access or under the federal Civil Right Act." Accordingly the court stated that it "need not consider whether the complaint was barred by the failure to exhaust administrative remedies" (J.A. 125-126). Relying on the decision of the California Supreme Court in *Agins v. Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff'd, 447 U.S. 255 (1980), the Court of Appeal held that the appropriate remedy where a land use regulation is challenged on the ground that it results in a taking without just compensation is not inverse condemnation, but an action to have the regulation set aside as unconstitutional. In this case, the court concluded that appellant's pending mandamus action was the appropriate procedure

⁶ As an alternative to inverse condemnation, appellant sought a declaratory judgment that the City and County's actions constituted an abuse of the police power and an appropriation of property in violation of the California and United States Constitutions. J.A. 58-59. However, the court held that mandamus, rather than an action for declaratory relief, was the appropriate California procedure (J.A. 106-107). Appellant also included in the complaint three counts seeking the return of \$75,000 it had paid in assessments to the El Macero Sewer Assessment District (J.A. 62-64). The court denied relief on those counts because appellant had not exhausted its administrative remedies to recover the assessments (J.A. 109). Appellant abandoned those three counts and the declaratory judgment count on appeal (J.A. 119), and they are not at issue here.

to be followed (J.A. 120-122). The court further held that, even if an inverse condemnation action were available, appellant had failed to state a cause of action (J.A. 122-123). The court explained that appellant had simply "applied for approval of a particular and relatively intensive residential development," and "[t]he denial of that particular plan cannot be equated with a refusal to permit any development," because the property was still zoned as residential (J.A. 133).⁷

The Court of Appeal also rejected appellant's argument that even if the sole remedy under California law is mandamus, appellant nevertheless could recover damages under 42 U.S.C. 1983. The court reasoned that in order for appellant to recover under Section 1983, any deprivation of property must have been without due process of law. Resolution of that question, in the court's view, depended on whether the State has provided an adequate remedy in the event of a deprivation. The court held that under the California Supreme Court's decision in *Agins*, adequate remedies do exist—mandamus or a declaratory judgment—if a property owner believes that a land-use regulation amounts to an uncompensated taking of private property. The court further held, however, that even if an action for damages might lie under 42 U.S.C. 1983 based on a regulation of the use of property, appellant's allegations in this case would be insufficient to support recovery because the County's refusal to approve the one development proposal did not rule out other, less intensive ones. J.A. 135.

⁷ The Court of Appeal also rejected appellant's inverse condemnation action insofar as it was based on the alleged denial of access to its property by virtue of the City's refusal to accept a dedication of an extension of Cowell Boulevard and the City's opposition to the extension of that street. The court explained that in order for inverse condemnation to lie under California caselaw, there must be a denial of an already existing means of access, not the mere refusal to provide access where none previously existed. J.A. 133-134.

SUMMARY OF ARGUMENT

I.

This case presents the question whether the denial by the County's Board of Supervisors of appellant's proposal to use his land for a subdivision constitutes an unconstitutional "taking" of property that entitles appellant to just compensation. As this Court made clear in *Williamson County Regional Planning Commission v. Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 17, in order for there to be a ripe taking claim in this context, the agency must have arrived at a definitive position with respect to the extent to which development will be permitted on the particular parcel of land. Only then would it be possible to determine that the government had either acquired or divested from the owner an identifiable interest in the real property involved. Moreover, because the determination of whether a taking has occurred turns on an essentially ad hoc factual consideration of the impact of the regulatory action, it is only after the agency has issued its final decision that the actual impact of the regulatory restrictions can be measured.

This case, however, is presented in an unusual procedural posture. It is unclear whether the Court of Appeal ruled on the threshold issue of whether the Board of Supervisors rendered a decision that finally determined the extent to which appellant would be permitted to develop its land. While concluding that the Board of Supervisors' rejection of appellant's one development proposal did not rule out other less intensive uses of the land, the Court of Appeal stated explicitly that it was not passing on the question whether appellant had exhausted its administrative remedies. Appellant's claim was that exhaustion would have been futile; appellee's only responsive pleading was a demurrer. And it is unclear as a matter of California procedure to what extent the appellee's demurrer is deemed to be an admission that further exhaustion would be futile. In these circumstances the

procedural posture of the case makes for an extremely abstract presentation of the significant legal issue whether an action for damages will lie when governmental regulation rises to the level of a taking. On the other hand, the merits of the question are deserving of resolution by this Court. With respect to ripeness, we suggest that this court recognize the importance of ripeness as an element of any cause of action and that it continue its adherence to *Williamson County* either in its own determination, if any, of the issue or in its instructions on remand.

II.

Appellant's claim of a "taking" as a result of the Board of Supervisors' denial of its subdivision proposal raises important questions under the Just Compensation Clause of the Fifth Amendment.

A. As an initial matter, several threshold issues may be readily disposed of. First, the government is required by the Fifth Amendment to pay just compensation as a condition to the lawful acquisition not only of fee title to land, but also of an interest that is not permanent in duration. Second, since this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it has been clear that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. Because regulation of land may constitute a "taking" within the contemplation of the Fifth Amendment, and because a temporary appropriation of land likewise constitutes a "taking," it follows that a regulatory restriction on the use of land that is of only temporary duration may, in appropriate circumstances, constitute a "taking" that implicates the Just Compensation Clause.

B. However, the conclusion that the temporary application of a regulatory measure could in some circumstances result in a taking does not answer the question presented in this case. The Court of Appeal held that an action for inverse condemnation does not lie in California

courts even if the application of a land-use regulation to a particular parcel of land does rise to the level of a taking. This ruling fails to take into account the fact that a compensable taking of property might occur between the date on which the application of the regulation became final and the date on which it was invalidated; and, if allowed to stand, the ruling's effect is to permit state and local agencies in California to take property (for the interim period) without the payment of compensation.

To say that a compensable taking may occur during this interim period does not resolve the question whether the Just Compensation Clause, of its own force, creates a damage remedy. Respectable arguments can be made on both sides of this issue. There is no need in this case, however, for the Court to determine whether the Fifth Amendment, of its own force, requires a court to order payment when a governmental entity takes action that amounts to a taking. In this case, appellant sought damages under 42 U.S.C. 1983, which provides a damage remedy for constitutional violations committed by municipal entities. Where Congress has enacted a statute to provide compensation to persons injured by constitutional violations, that remedy first should be tested before determining what remedies are required by the Constitution itself. Section 1983 provides an adequate remedy under either view of the nature of the cause of action in circumstances such as those alleged in this case.

The Court of Appeal rejected appellant's cause of action under 42 U.S.C. 1983 on the ground that the availability of a procedure for a writ of mandate or declaratory judgment furnished an adequate remedy in the event of a deprivation and thereby eliminated any due process claim. This was error. Whether a taking has occurred during the period between the time the regulatory action becomes ripe and the time when it is invalidated should instead be determined by the same ad hoc factual analysis that this Court has applied in the takings area gen-

erally, considering the nature of the governmental action involved, the economic impact of the regulation, and the extent of the interference with reasonable investment-backed expectations. Therefore the case should be remanded for the Court of Appeal to consider the allegations in appellant's complaint under these standards.

ARGUMENT

I. THE THRESHOLD ISSUE IN CASES ALLEGING A "TAKING" IS WHETHER THE CLAIM IS PREMATURE

A claim of a taking can arise only if the responsible administrative agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 17.

This finality requirement is reinforced by the nature of the subject to which the Just Compensation Clause is directed: the acquisition of an identifiable interest in property by the government or the divestment of such an interest from the owner. See *United States v. Causby*, 328 U.S. 256, 267-268 (1946). Accordingly, an actual "taking" of a property interest by the government as a result of the operation of a regulatory program properly can be found only where the responsible official has made a deliberate and conclusive judgment regarding the extent to which the property will be restricted.

We need not belabor the obvious and critical importance of the proposition that the mere contemplation by a government and its agents of a regulatory action that might constitute a "taking," when and if implemented, should not entitle a plaintiff to advisory judicial review of the proposed action or to damages. Stated simply, there can be no constitutional injury until the governmental action is "complete" (*Williamson County*, slip op. 22). Thus

ripeness is in essence a necessary element of a cause of action based on a taking without just compensation.

Moreover, this ripeness prerequisite "is compelled by the very nature of the inquiry required by the Just Compensation Clause" (*Williamson County*, slip op. 17), which depends on an "essentially ad hoc" consideration (*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)) of the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations (*Williamson County*, slip op. 17). This is particularly true in a case such as this one, where the alleged taking is based on the effect of regulation, which are claimed to have deprived the landowner of all economic value of his property and where there is a request for compensation for the period of time from the taking until the lifting of the regulation. For in such cases it is crucial to determine (1) whether some alternative economically valuable uses were available to the landowner, if only he had sought permission to pursue them, and (2) if such alternative uses are not available, what the duration of the deprivation was. The weighing of these and other factors cannot be evaluated until the agency has arrived at a definitive position.

The factors to be considered in making a determination of ripeness in the context of land-use planning regulations were set out by this Court last term in *Williamson County*. We believe that the opinion of the Court in *Williamson County* is a fair and correct statement of the law in this area, and we do not believe that the instant case presents any reason for reexamining the Court's decision there.

However, because of the procedural posture of this case, it may be that this Court is not presented with a situation that would require it to apply the rule of *Williamson County* to the facts here. Appellant alleged that the County had determined that the property could be used only for agricultural purposes and had absolutely precluded any development or beneficial use of the prop-

erty; that any applications for variances or other relief would have been futile; and that he therefore had exhausted his administrative remedies (J.A. 58; J.S. 8-10). While the Board of Supervisors did articulate particular reasons for disapproving the tentative map that appellant filed (J.A. 73-77) and appellant did not offer a revised tentative map to the Board in order to meet its objections (J.A. 133), the important fact here is that this case has come before this court on a demurrer to the complaint in California state court.*

To the extent that under California procedural law the allegations of futility and complete deprivation are deemed to be admitted by appellees on a demurrer, this Court may deem, arguendo, that there is ripeness for purposes of deciding whether there exists a cause of action (one of the elements of which is ripeness) for compensation for an interim, regulatory taking of property. Such a deemed ripeness should not and will not lessen appellant's burden of eventually demonstrating the finality of the administrative action either on remand to the Court of Appeal or when put to its proof at trial on subsequent remand to the Superior Court.

There is, however, a regrettable confusion in the opinion of the court below about the appropriate judicial treatment of the allegation of ripeness on the demurrer to the complaint in this case. In the introductory section of its opinion, the California Court of Appeal stated that it did *not* consider "whether the complaint was barred by the failure to exhaust administrative remedies" (J.A. 125-126). Nevertheless in the body of its opinion the Court of Appeal states that "even if an inverse condemnation action were available" (J.A. 132), appellant's complaint failed to state a cause of action because "as in

* Under California law, apparently factual allegations in the complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Agins v. Tiburon*, 447 U.S. 255, 259 n.6 (1980), quoting *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976).

Agins, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development" (J.A. 133).

This ambiguity points this Court in two quite divergent directions. The determination in the introductory section would seem to force on this Court the constitutional question of what remedy if any is required when all the elements of a taking have been met, since that determination denies the availability of a damage remedy on the assumption that they have been met. The body of the opinion, however, acknowledges the existence of a number of open questions and avenues of administrative relief which if pursued might well dispel the constitutional deprivation appellants allege.

The Superior Court found at the trial level that the case was not ripe. The questions posed in the jurisdictional statements of the parties would leave open the issue of whether the facts of this case actually pose a ripe claim. Instead, they implicate ripeness in a conclusory way only as a necessary element in a valid cause of action on demurrer.

The issues on the merits of this case are important and deserve resolution. On the other hand, this Court has a proper reluctance to consider issues in an excessively abstract posture. However the Court resolves this preliminary question in the unusual procedural status of this case as described above, we urge with respect to ripeness (1) that this Court reaffirm the importance of ripeness as an element of any "taking" cause of action and (2) that, if the Court should decide that it does not at this time wish to delineate the other constituent elements of a valid "taking" cause of action, if such there be, prior to a determination of ripeness, that the Court should continue its adherence to the principles of *Williamson County* either in its own determination of the issue or in

its instructions on remand for a more complete consideration of the issue by the court below.⁹

⁹ In this case, the Board of Supervisors gave a number of reasons for disapproving appellant's tentative map, one of which was that there was no provision for the furnishing of sewer services. Appellant's proposal indicated that the subdivision would be served by the El Macero sewer line. See page 5, *supra*. However, the Board pointed out that under the formal agreement governing that line, the site first would have to be annexed to the El Macero County Service Area; that was a matter within the jurisdiction of the LAFCO, and yet appellant had not initiated proceedings before the LAFCO for the annexation of its site (J.A. 75). This omission by appellant may be analogous to the failure by the respondent bank in *Williamson County* to seek variances from the application of the regulatory provisions that led to the denial of the preliminary plat, which the Court held prevented the planning commission's decision from attaining the finality necessary to give rise to a ripe taking claim. Slip op. 14-17. Alternatively, it may be usual practice not to seek such annexation until Board approval is obtained, proof of which by appellant could indicate that this objection by the Board was a subterfuge. Perhaps there were means available to appellant to minimize or eliminate other of the deficiencies the Board identified as well. Even if there were not, the key point, as the Court made clear in *Williamson County*, is that it is necessary to obtain a final decision on *all* of the agency's objections to the initial submission made by the developer before a taking claim is ripe for judicial review. Slip op. 16 n.11.

Appellant also did not attempt to submit a more modest proposal in an effort to meet at least some of the Board's concerns. The Court of Appeal stated (J.A. 122-123) that this omission renders appellant's claim similar to that of the landowners in *Agins*. Unlike the landowners in *Agins*, however, appellant did submit one subdivision proposal. The Court of Appeal determined that the rejection of that one proposal "cannot be equated with a refusal to permit any development" (J.A. 133). Like the landowners in *Agins*, appellant may remain free to pursue its reasonable investment-backed expectations by submitting a more modest proposal to the County. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136-137 (1978) (rejection of one proposal for substantial project does not suggest a prohibition of all construction); see also *Williamson County*, slip op. 13-14. On the other hand, appellant has alleged that further proposals would have been futile

II. IF THE COURT REACHES THE MERITS OF THE "TAKING" CLAIM, THE COURT OF APPEAL ERRED IN DISMISSING THE COMPLAINT

Appellant's claim for a money judgment against the City and County raises important questions regarding the Just Compensation Clause of the Fifth Amendment.

and the appellees have demurred to that complaint. It may be that such a bare, unelaborated allegation, even when demurred to, is not sufficient to overcome the necessity to make a reasonable effort to comply with administrative objections to a particular land use proposal. As the Court of Appeal observed, "[l]and use planning is not an all-or-nothing proposition" (J.A. 133); it is a complex and sensitive undertaking that requires the local agencies involved to take into account many different and competing factors. As a result, it often may be necessary for the landowner to revise his original submission in order to meet concerns identified by the planning commission, various reviewing agencies, and the public. The Court of Appeal therefore was obviously correct in concluding that "[a] governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of property" (*ibid.*).

A court in any event should pay considerable deference to the determination by the agency concerned as to what constitutes the agency's final determination of the extent to which development will be permitted on the property; and a court should not consider a taking claim where administrative procedures remain to be pursued, unless there has been an authoritative representation by the agency that further pursuit of those procedures would be futile. Cf. *Weinberger v. Salft*, 422 U.S. 749, 765-767 (1975). Moreover, in the absence of compelling circumstances, a court should not attempt to look behind the agency's formal decision and findings to probe the mental processes of the decision-makers in an effort to attempt a judicial resolution of the question of futility. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Morgan*, 313 U.S. 409, 422 (1941). However, a course of dealing by the responsible agency officials amounting to bad faith in their consideration of successive proposals that were submitted by the developer in a good-faith effort to meet the agency's concerns might be regarded as an effective waiver by the agency of the need to submit further proposals. Cf. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655-656 n.22 (1981) (Brennan, J., dissenting).

A. A Regulatory Prohibition Against The Use Of Property, Even If Temporary In Nature, Can In Certain Circumstances Constitute A "Taking"

Whatever the analytical complexity of certain aspects of the overall "regulatory taking" controversy that has so frequently attracted the Court's attention in recent years, two points are, we think, clearly established.

The first point is that the government is required by the Fifth Amendment to pay compensation not only as a condition to its acquisition of fee title or its functional equivalent, but also as a condition to the taking of a lesser interest—such as an appropriation of a leasehold or other interest that is not permanent in duration. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). In this sense, a "temporary taking" of property is plainly within the scope of the Just Compensation Clause.

The second point concerns the application of the Just Compensation Clause beyond the context of an actual physical appropriation or invasion of a person's private property by the government to a regulatory restriction on the use or exploitation of property by its owner. This issue was laid to rest by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). There, although the Court stressed the obvious truth that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," the Court held that when the diminution occasioned by the regulation of property "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. at 413. In other—and oft-quoted—words: "The general rule at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. On a number of occasions since *Mahon* was decided, the

Court has adhered to the view that "governmental land-use regulation may under extreme circumstances amount to a 'taking' of the affected property." *United States v. Riverside Bayview Homes*, No. 84-701 (Dec. 4, 1985), slip op. 4. See, e.g., *Williamson County*, slip op. 12; *Penn Central*, 438 U.S. at 124.

Because regulation of land may constitute a "taking" within the contemplation of the Fifth Amendment, and because a temporary appropriation of land likewise can constitute a "taking," it would seem to follow inexorably that a regulatory restriction on the use of land that is of only temporary duration may also, in appropriate circumstances, constitute a "taking" that implicates the Just Compensation Clause.

B. The Court Need Not Decide Whether The Fifth Amendment Requires The California Courts To Award Money Damages For An Alleged "Taking" Of Appellant's Property, Because 42 U.S.C. 1983 Furnishes A Cause Of Action

1. The proposition discussed in Point A that the temporary application of a regulatory measure to particular property may result in a "taking" within the meaning of the Fifth Amendment does not, however, dispose of this case. The courts below did not address the question whether the Board's denial of appellant's subdivision proposal would give rise to a taking if the resulting limitations on the use of appellant's property were given permanent effect. Nor did the courts below determine whether a taking had occurred as a result of the temporary inability of appellant to develop its property pending resolution of appellant's action to invalidate the regulation. Instead, the court sustained the demurrer to the complaint on the ground that, under the California Supreme Court's decision in *Agins*, an action does not lie in California courts for inverse condemnation even if the application of a zoning ordinance or other land-use regulation to a particular parcel of land does rise to the level

of a taking. Consistent with *Agins*, the Court of Appeal held that a suit to invalidate the administrative action is the only available remedy. See J.A. 132-133.

The error in the analysis of the court below is its failure to recognize that invalidation of the regulation does not necessarily end the constitutional inquiry. There may indeed be a taking of property during the period between the date the regulation became final and the date on which it was invalidated. Hence, California law, which appropriately provides that a regulation which deprives the landowner of economically viable use must be invalidated, nonetheless expressly fails to provide to the landowner a remedy for the interim period. Thus the rule established in the California Supreme Court's *Agins* decision may have the effect of allowing state and local governments in California to "take" property (for the interim period) without paying the owner any compensation. The plain text of the Constitution forbids the government from "taking" property—even temporarily—without paying for it.

As the Court has noted, the Fifth Amendment "undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in [their] path" (*United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)). But when a taking occurs during that interim period, the California Supreme Court has frustrated the Constitution's Just Compensation guarantee that "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

2. To say that a taking without just compensation may occur during the interim period, does not, however, answer the question whether the Just Compensation Clause itself creates an automatic damages remedy.

The fact that the Constitution refers to "compensation" for property "taken" suggests that the Clause itself pro-

vides a damages remedy. Moreover, this Court has embraced the view that the Just Compensation Clause has a "self-executing character * * * with respect to compensation." *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting 6 J. Sackman, *Nichols' Law of Eminent Domain* § 25.41 (3d rev. ed. 1980)). As Justice Brennan noted in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 653-657 (1981) (Brennan, J., dissenting), "[t]his Court has consistently recognized that the just compensation requirement of the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded" (emphasis in original). For example, in *Jacobs v. United States*, 290 U.S. 13, 16 (1933), the Court held:

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.

Under an analysis which implies an automatic damages remedy, there is no need to resort to a statute because "[t]he rights of the * * * property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as a price for the taking." *Berman v. Parker*, 348 U.S. 26, 36 (1954).¹⁰ Accord,

¹⁰ See also *Grigg v. Allegheny County*, 369 U.S. 84, 84-90 (1962); *United States v. Lynah*, 188 U.S. 445, 462 (1903) ("we are of opinion that the United States, having by its agents, * * * taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation") (emphasis supplied); *Great Falls Manufacturing Co. v. Attorney General*, 124 U.S. 581 (1888) (holding that when the government "takes" property, the

United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

Under an alternative theory, however, the phrase "without just compensation" in the Clause might be read merely to make the existence of a means for obtaining compensation a "condition precedent" to the lawful taking of property by the Government. And this court has in dicta in the past so construed the Clause. *Sweet v. Rechel*, 159 U.S. 380, 399 (1895); see also *United States v. Jones*, 109 U.S. 513, 518 (1883). Read in this way, if a court concludes that the condition precedent is not satisfied because the legislature has not provided for compensation, the only constitutionally required remedy may be for the court to order the Government to give back to the owner the property it was found to have taken, not to order the government to perform the condition itself, by paying compensation.¹¹

Whether the Just Compensation Clause itself provides a damages remedy must also be considered in light of cases which hold that "[t]he taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not an act of the Government" that gives rise to a claim for just compensation. *Regional Rail Reorganization Act Case*, 419

owner may waive his right to have the government action invalidated and insist on recovering value, even if there was no direction from Congress to take the particular property); *Kohl v. United States*, 91 U.S. 367, 374 (1876).

¹¹ See *Williamson County*, slip op. 25, and cases cited; *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (the Government "may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond"); *Penn Central*, 438 U.S. at 124 (referring to the question "whether a particular restriction will be rendered invalid by the government's failure to pay"); *Mahon*, 260 U.S. at 400, 413; *Hortsmann Co. v. United States*, 257 U.S. 138, 146 (1921); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 238-241 (1897); *Sweet v. Rechel*, 150 U.S. at 398-399; *United States v. Jones*, 109 U.S. at 518.

U.S. 102, 127 n.16 (1974), quoting *Hooe v. United States*, 218 U.S. 322, 336 (1910).¹² The actions of an Executive officer in those circumstances would be tortious, and would create no liability unless Congress had so provided. See *United States v. North American Co.*, 253 U.S. 330, 334 (1920). Under this theory the remedy instead is an action against the government officer involved for injunctive relief, and, subject to established immunities, for damages. See *United States v. Lee*, 106 U.S. 196 (1882). See also *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 696-698 (1949); *Cherokee Nation v. Kansas Ry.*, 135 U.S. 641, 649-650 (1890).

Where an action is brought against a State, implying a damages remedy directly under the Just Compensation Clause raises the additional constitutional issue of the viability of the Eleventh Amendment immunity of the state in federal court and the state's immunity to suit in its own courts except as it consents to suit.

3. There is no need at the present time, however, for a resolution of the difficult question whether the Fifth and Fourteenth Amendments solely by their own combined force require courts to order payment when a governmental entity takes regulatory action that "goes too far" and therefore amounts to a taking. In this case, appellant also sought relief in the courts below under

¹² See also *Ruckelshaus v. Monsanto*, No. 83-196 (June 26, 1984), slip op. 27; *Damas & Moore v. Regan*, 453 U.S. 654, 688 (1981); *Mitchell v. United States*, 267 U.S. 341, 345 (1925). In this case, a number of the allegations in appellant's complaint charge the City and County with having engaged in unlawful conduct. See, e.g., paras. 14 (J.A. 46), 18 (J.A. 48), 21 (J.A. 49-50), 22 (J.A. 50), 25 (J.A. 51-52), 29 (J.A. 58-59), 35 (J.A. 61), 44 (63). If unauthorized conduct contributed substantially to the Board's denial of appellant's application, no lawful "taking" by the government within the meaning of the Fifth Amendment has occurred. Instead, appellant's claim is essentially one sounding in tort for wrongful conduct in the administration of a regulatory program. Compare *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984), slip op. 10-12; 28 U.S.C. 2680(a).

42 U.S.C. 1983, and that statute would appear to furnish a sufficient basis for a monetary recovery. Section 1983 provides that "[e]very person"—which includes a municipality, see *Owen v. City of Independence*, 445 U.S. 622 (1980)—who, under color of any statute or ordinance of a state, causes another person to be subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Where Congress has enacted a statute for the specific purpose of compensating persons injured by constitutional violations, that remedy should be pursued first. Only if it is found inadequate in practical application should the Court consider the recognition of remedies compelled or implied by the Constitution itself. Cf. *Bush v. Lucas*, 462 U.S. 367, 374-380 (1983).¹³

In our view, 42 U.S.C. 1983 furnishes an adequate basis for recovery of a money judgment under either of the two theories of the nature of the cause of action that could arise if a regulatory measure goes "too far" in affecting property and therefore has the same effect as a taking accomplished by the exercise of the power of eminent domain. Under the first theory (that the regulatory action is a taking for which the Fifth Amendment of its own force requires a court to award just compensation to the owner of the affected property, whether or not the legislature has made compensation available when it authorized the conduct involved), a cause of action would lie under 42 U.S.C. 1983 to recover the compensation that the Fifth Amendment itself makes available.

On the second theory, the failure of the legislature to furnish a means by which the owner may recover just compensation renders that action unconstitutional

¹³ In *Agins*, the landowner did not rely on 42 U.S.C. 1983, and the California Supreme Court therefore had no occasion to consider what remedies might be available under that provision.

and void under the Just Compensation Clause of the Fifth Amendment. In that event, 42 U.S.C. 1983 would furnish a cause of action for damages for the injury sustained as a result of that violation. Under this second theory, the illegality is confined to the failure to compensate the owner for the property. It therefore follows that the appropriate measure of damages in an action under 42 U.S.C. 1983 for the injury sustained is the just compensation that the Fifth Amendment required to have been made in order to sustain the governmental action. If the property owner receives a money judgment in that amount, the constitutional defect—the absence of compensation—is completely cured.

For the foregoing reasons, 42 U.S.C. 1983 furnishes a suitable basis of recovery of money damages for the alleged “taking” of appellant’s property, whether or not the Fifth Amendment, standing alone, compelled the courts of California to make such an award.¹⁴

¹⁴ The Court in *Williamson County* described the alternative theory of the cause of action in somewhat different terms than we have set forth in the text. There, the Court stated that the argument advanced by the Planning Commission and the amici was that a regulatory measure can never effect a “taking” within the meaning of the Fifth Amendment, but instead should be viewed as an invalid exercise of the police power that is violative of the Due Process Clause of the Fourteenth Amendment. Slip op. 11-12, 23-26. With all respect, we do not believe (and we did not argue in our brief amicus curiae in *Williamson County*) that this is the correct view of the alternative theory to that under which the Fifth Amendment is self-executing.

As we have explained (see pages 19-20, *supra*), a governmental regulation can give rise to a “taking” for purposes of the Fifth Amendment’s Just Compensation Clause. Indeed, in *Riverside*, the Court made clear that if the denial of a permit under Section 404 of the Clean Water Act had a sufficiently severe impact, it would be a taking that gives rise to a cause of action under the Tucker Act for Just Compensation, because Congress is deemed to have made compensation available in such circumstances. Slip op. 6-7 & n.5. Under the alternative theory we set forth in the text, the question is not whether the impact on the property is accomplished

4. The Court of Appeal rejected the Section 1983 claim on the ground that there could be no due process violation if the state has furnished an adequate remedy in the event of a deprivation. J.A. 135, citing *Parratt v. Taylor*, 451 U.S. 527, 536 (1981). The Court of Appeal apparently was referring to the availability of mandamus as the adequate remedy. We of course agree that the availability of a mechanism for a prompt challenge to a regulatory measure that, if made permanent, would effect a taking is an important ingredient in determining whether an interim taking has occurred. A landowner should not be excused from pursuing available judicial remedies which seek to have the regulatory restraint lifted at the earliest possible date. Cf. *United States v. \$8,850 in United States Currency*, 461 U.S. 555, 568-569 (1983). But it also is clear that the operation of the regulation during the interim period may in certain circumstances amount to a taking. Whether a taking has occurred during this period depends upon the same sort of ad hoc factual inquiry that this Court has applied in the takings area generally. For this reason, in our view, the Court of Appeal erred in concluding that an action will *never* lie under 42 U.S.C. 1983 in this setting simply because the state has afforded a procedure for lifting the challenged regulatory measure on a prospective basis. Accordingly, if the Court reaches the issue, it would be appropriate for the Court to vacate the judgment below and remand the case to the Court of Appeal for further consideration of the allegations in the complaint under 42 U.S.C. 1983. Then, if appropriate, the Court of Ap-

by a physical appropriation rather than a regulatory measure, but whether the legislature has made compensation available for the governmental action involved in the event that it should be held by a court to amount to a taking. If the legislature has not done so, then under the alternative theory we posit, a court would hold the “taking” unconstitutional under the Just Compensation Clause (not the Due Process Clause), because it was accomplished “without just compensation.”

peal could remand the case to the Superior Court for suitable coordination with appellant's pending mandate action, should appellant choose to revive it.

5. The factors to be considered under 42 U.S.C. 1983 in determining on remand whether appellant has sufficiently alleged or established that a Fifth Amendment violation has accrued pending the outcome of the mandate proceeding are essentially the same as those that bear on the question of whether a taking would result from the *permanent* application of the regulatory restriction—albeit they must be applied with due regard for circumstances that are unique to the interim or temporary nature of the deprivation. Under this Court's decisions, the relevant considerations in any regulatory taking case are: (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation," and (3) the extent to which there has been an interference with "distinct investment-backed expectations" (*Penn Central*, 438 U.S. at 124; see also *Kaiser Aetna*, 444 U.S. at 175; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

Because the Court of Appeal did not consider whether the allegations of the complaint state a cause of action under 42 U.S.C. 1983 for any "taking" of appellant's property that might have occurred pending the outcome of the mandate proceeding, we believe that if this Court reaches the "taking" issue it should remand the case for consideration of these matters.

CONCLUSION

If the Court reaches the question of the availability of a damages remedy, the judgment of the Court of Appeal should be vacated and the case should be remanded to the Court of Appeal for further consideration of appellant's cause of action under 42 U.S.C. 1983.

Respectfully submitted.

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DECEMBER 1985

AMICUS CURIAE

BRIEF

No. 84-2015

Supreme Court, U.S.

F I L E D

JAN 27 1986

JOSEPH E. PANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MACDONALD, SUMMER & FRATES, A Partnership,
Appellant,
v.

THE COUNTY OF YOLO AND THE CITY OF DAVIS,
Appellees,

On Appeal from the Court of Appeal of California

BRIEF OF THE AMERICAN FARMLAND TRUST,
NATIONAL AUDUBON SOCIETY,
THE SIERRA CLUB,
NATURAL RESOURCES DEFENSE COUNCIL,
NATIONAL TRUST FOR HISTORIC PRESERVATION
AND THE ENVIRONMENTAL FUND
AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a "taking" cause of action has been stated where the only allegation of a protectable property right is the claim that a local government has exercised its plenary discretion under state law to decide not to extend public services beyond an established municipal boundary line to assist Appellant in the conversion of its existing farm use to an urban subdivision use.

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THE SIERRA CLUB,
NATURAL RESOURCES DEFENSE COUNCIL,
NATIONAL TRUST FOR HISTORIC PRESERVATION
AND THE ENVIRONMENTAL FUND
AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above listed organizations file this brief as Amicus Curiae in support of Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and conservation of the natural and built environment and with environmentally sensitive land use regulation and planning. All of the Amici seek to encourage environmentally and economically sound land use policies. All of the Amici support careful growth management efforts by local governments. Such efforts have had a beneficial effect on the preservation of historic buildings and structures, and have made it possible to protect the significant environmental qualities of sensitive lands such as wetlands, flood plains and coastal areas.

By arguing that the allegations of this complaint state a claim under the United States Constitution, Appellant seeks a ruling that would threaten the effectiveness of local land use regulations throughout the country. A more detailed description of each Amicus appears in the Appendix to this brief.

STATEMENT OF FACTS

Amici adopt the statement of facts contained in Respondents' brief.

SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to explicate the necessary elements of a "taking claim." Because Appellant's Fourth Amended Complaint fails to

state a cause of action, the Court should not reach the issue of whether a *post hoc* invalidation of a police power regulation justifies an award of money damages. Appellant's attempt to force that issue into this case should be rejected.

A. Appellant has failed to plead a protectable property interest and has, therefore, failed to state a claim. An initial and essential element of a "taking claim," whether under the Constitution or 42 U.S.C. § 1983, is the existence of a protectable property interest. While Appellant claims that the city and county have "taken" its property because the city chose not to extend services to Appellant's previously unserved property, it is apparent that no one has "taken" anything. Under the law of California, as under federal law and the law in most states, a city is not required to extend municipal services to previously unserved and unincorporated areas or to annex unincorporated areas into the city. The city simply chose not to provide service, and this decision leaves Appellant free to put its farmland to the same use it was in when Appellant acquired it. That decision cannot form the basis of a taking claim because Appellant has no protectable property right to receive urban services from the City of Davis or to have its property annexed into that city.

B. Appellant is currently using its land for agricultural purposes. It has carefully failed to plead that this use is not economically viable. Moreover, the factors it cites as detrimental to its economic use were not caused by any acts of the Respondents.

As a fee simple land owner, Appellant has not carved out any type of crystallized property interest that would justify an analysis based on investment-backed expectations. If such an analysis were made, however, it would show that Appellant's alleged perception of a long-standing pattern of governmental hostility to development belies the reasonableness of its purported expectations of development approval.

Because Appellant never had access to the public services it now seeks, there has been no taking of a right of access. Even if there had been such taking, however, Appellant's complaint is deficient for failure to allege that the loss of access impairs the economic viability of the property as a whole.

C. This Court cannot reverse the decision of the California Court of Appeal without interfering with legislative decisions to which it has traditionally shown great deference and without opening the federal courts to a flood of routine state zoning cases. The questions raised in Appellant's complaint are inappropriate for judicial review because decisions concerning municipal boundaries and the extension of public services are traditionally left to the discretion of elected state and local officials. The police power of local legislative bodies includes the power to control the use and development of land, to set municipal boundaries, and to exercise discretion in providing for public services. This Court has traditionally respected the right of those legislative bodies to exercise their discretion free from judicial second-guessing.

Public improvements cost money—both to build and to maintain—and there are a host of competing demands on those same funds. The judicial system has wisely been hesitant to inject itself into such matters. If this Court should reverse that trend, the ensuing volume of potential litigation could be immense.

ARGUMENT

The Court's recent "taking issue" decisions have gradually built a body of law to set parameters around an issue that defies simplistic answers. This case presents another opportunity to explore the issue. Because it is clear, however, that Appellant's Fourth Amended Complaint fails to state a cause of action, it is unnecessary and inappropriate for this Court to address the hypothetical questions that Appellant attempts to force into this case.

Indeed, this case presents another example of the analytical quagmire that cautions against glib, black letter pronouncements on the subject of "regulatory takings." Recent decisions of this Court dealing with the issue of when, if ever, the *post hoc* invalidation of a police power regulation will justify an award of money damages have been criticized by some as failing to "answer the question." That criticism misses the point. This Court sits to decide the cases that come before it, not to answer hypothetical questions.

What this case most clearly presents is an opportunity to further elucidate the essential elements of the elusive "taking claim." If and when a complaint states all the essential elements of such a claim, then there will be time enough to "answer the question" of whether money damages is a proper remedy.

A. Appellant Has Failed to Plead a Protectable Property Interest and Has, Therefore, Failed to State a Claim.

1. No One Has "Taken" Anything; Appellant Complains Only of Government's Refusal To Give Public Services.

Appellant attempts to plead a cause of action based on the alleged uncompensated taking of its property. The first essential element of such a cause of action, whether pled under the Constitution or under 42 U.S.C. § 1983, is the existence of a protected property interest. Appellant has pled, and can plead, no such interest. Its complaint was thus properly dismissed. The issue of remedy is, therefore, not properly before the Court.

The decision of the California Court of Appeal dismissing this action for failure to state a cause of action is fully consistent with this Court's own precedents. An affirmance of that decision will further clarify the law in this important area.

Appellant bought a piece of farmland in unincorporated Yolo county. The farm is served with no urban services whatever; it does not abut on any public street; it is not

within the bounds of any municipality; and it lies nearly a third of a mile from the nearest public street. The City has chosen not to extend its public services to serve Appellant's farm.¹ On those facts, Appellant asks this Court to find that the city and the county have "taken" its property and violated its rights under the federal Constitution.

No one has "taken" anything. Appellant still owns precisely what it bought. What appellant complains of is not that the public has "taken" something; rather, it complains of its disagreement with a public decision *not to give* something. Appellant remains free to put its farmland to the same use it was in when Appellant acquired it.

2. Appellant Has No Constitutionally Protected Right to Have Public Services Extended to Its Previously Unserved Piece of Farmland.

Appellant is no longer satisfied with the farmland it purchased. Appellant would now like the City of Davis

¹ This brief proceeds on the assumption that Appellant has properly and accurately alleged that the City of Davis has, in a variety of ways, declined to provide municipal services to the subject property and that this refusal of services, in turn, provided the principal basis for Yolo County's denial of subdivision approval. It is the position of these Amici that even on such assumed facts, Appellant has failed to state a cause of action.

Amici notes, however, that these assumptions are generous to Appellant. From the record before the Court, it appears that Appellant has taken no meaningful steps whatever to secure the extension of the public services that would be required by its proposed subdivision. Appellant has never applied to amend the city's general plan, a prerequisite to the extension of Cowell Boulevard. Cal. Gov. Code § 65402(a). Appellant has never applied for annexation to the El Macero County Sewer Service Area. (J.A. 75, ¶ 9 and ¶ 11; C.T. 1117). Appellant has made no effort to secure connection to a public water system. (J.A. 76, ¶ 14). On this record, the decision of the California Court of Appeal should be affirmed on the basis of this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108 (1985).

to annex its farmland and provide it with city services at substantial public cost. Stated another way, Appellant would like the public to provide the services necessary to allow Appellant to reap a subdivision return on its farm investment. That desire, however, does not rise to the level of a protectable property interest under the United States Constitution and this Court's precedents.

a. Property Rights Are Defined by Existing Rules and Understandings.

The proper interests protected by the United States Constitution:

[O]f course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Appellant claims that it has a property right to have urban services extended beyond the corporate limits of the City of Davis to its property so that Appellant can convert its unincorporated farm into an urban subdivision. Neither the law of California, nor of any other state of which we are aware, gives any property owner such a right. Surely the United States Constitution gives no such right.

b. There Is No Right to An Extension of Public Services.

Under California law, the City of Davis has no duty to extend municipal services to Appellant's unincorporated farm. *Dateline Builders, Inc. v. City of Santa Rosa*, 146 Cal. App. 3d 520, 194 Cal. Rptr. 258 (1983); *Richards v. City of Tustin*, 225 Cal. App. 2d 97, 37 Cal. Rptr. 124 (1964); *Hollister Park Inv. Co. v. Goleta County Water District*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978). In *Richards*, the court refused to compel the city to provide sewage disposal facilities for the plaintiff's property. In so holding, the court noted that cities are not required to furnish previously unserved property owners with sewage disposal services. *Richards*, 225 Cal. App. 2d at 98,

37 Cal. Rptr. at 126. In *Hollister*, the court found no protectable right to obtain a connection to a public water supply. *Hollister*, 82 Cal. App. 3d at 293. Similarly, the City has no duty to annex Appellant's farm into the city. *City of Santa Cruz v. Local Agency Formation Commission*, 76 Cal. App. 3d 381, 142 Cal. Rptr. 873 (1978); *Calnev Pipeline Co. v. City of Colton*, 230 Cal. App. 2d 189, 40 Cal. Rptr. 755 (1964); *People ex rel. Averna v. City of Palm Springs*, 51 Cal. 2d 38, 331 P.2d 4 (1958). In considering a landowner's claim for compensation for an alleged taking of its property, the *Calnev* court asserted that "no one has a vested right to be either included or excluded from a local government unit." *Calnev*, 230 Cal. App. 2d at 186, 40 Cal. Rptr. at 759 (quoting *People ex rel. Averna v. City of Palm Springs*, 51 Cal. 2d 38, 331 P.2d 4, 9 (1958)).

Thus, under California law, Appellant has no right to demand either that the City of Davis extend its public services beyond its borders or that Davis expand its borders to encompass Appellant's farmland. These are matters that state law has wisely committed to the discretion of the City's elected officials, because the extension of public facilities carries with it the burden of operating and maintaining those facilities, with all of the fiscal and economic ramifications that accompany such obligations.²

² The law of California is not unusual in this regard. Indeed, the general rule throughout this nation is that the government has no duty to extend public services to previously unserved properties. See 18 McQuillin Mun. Corp. § 53.119 (3rd Ed. 1978); *Cloyes v. Delaware Twp.*, 23 N.J. 324, 129 A.2d 1 (1957) (though State Department of Health may compel municipality to provide for sewage, underlying statutes do not impose general duty upon municipalities to install sewage system); *Atlantic Coast. Co. v. City of Raleigh*, 230 N.C. 365, 53 S.E.2d 165 (1949) (residents living outside corporate limits of city cannot, in absence of contract providing otherwise, compel a city to make its public utilities services available to them); *Armstrong v. Hughesville Borough*, 24 Pa. D.&C.2d 401 (Pa. Com. Pl. 1961) (boroughs have the authority, not the duty, to provide sewer systems, and, therefore, the matter is within their discretion as to nature, capacity, and cost of such systems); *Village of Millstadt v. Bereitschaft*, 344 Ill. 550, 176 N.E. 746 (1931).

Appellant seems to claim that the county's residential zoning of the subject property obligates the city to extend municipal services, but it cites no authority under California or other law in support of this unique theory of intergovernmental transfer of responsibility. (Appellant's Brief p. 14). Because California law gave the City of Davis total discretion to decide whether or not it wished to extend its public services to serve Appellant's farm, Appellant has no protectable right to receive such services. *Board of Regents v. Roth*, 408 U.S. at 577. When state law leaves the decision to the "unfettered discretion" of the government agency there is "absolutely no interest" for the Constitution to protect. *Id.* at 577-78. See also *Bishop v. Wood*, 426 U.S. 341 (1976); *Jago v. Van Curen*, 454 U.S. 14 (1981) (*per curiam*); and *Olim v. Wakinekona*, 461 U.S. 238 (1984).³

3. Appellant's "Denial of Access" Claim Does Not Cure Its Lack of a Protectable Property Right.

Appellant attempts to avoid this clear result by asserting that it has been "denied access" to its farm and that

(question of necessity of local improvement is for city council to determine, and courts will not substitute its judgment for that of municipal authorities); *State ex rel. Holifield v. Sewerage and Water Board*, 108 So. 2d 277 (La. App.), cert. denied, 361 U.S. 817 (1959) (city may control extension of public services to previously unserved properties); and *Moore v. City Council*, 32 Ky. 384, 105 S.W. 926 (1907) (city may exercise discretion in extending services and mandamus will not lie to compel a city to do so).

³ This is, of course, not a case in which the "usual and general" concept of property has arbitrarily and without police power justification been set aside by a state law that attempts "by *ipse dixit* . . . [to] transform private property into public property" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). As noted in the preceding text and footnote, the established common law and statutory tradition in this country, including California's, is that local governments have no duty to extend public services into presently unserved areas. As noted in Part C of this brief, this Court and other courts have historically and repeatedly deferred to the exercise of legislative discretion concerning such matters and have rejected claims by property owners seeking to compel the extension of such services.

this denial of access is, in and of itself, sufficient to state a valid inverse condemnation claim. The California Court of Appeals addressed and properly disposed of this contention. First, the claim fails because it does not even allege denial of access. All it alleges is denial of the specific type of access that Appellant desires in connection with its wish to convert its farmland into an urban subdivision. There is no claim of total denial of access. Second, as correctly stated by the California Court, Appellant's denial of access claim fails because Appellant's property had not previously enjoyed such access to Cowell Boulevard. Under California law, a claim for denial of access is valid only where government interferes with existing rights of access. See *Hollister Park Inv. Co. v. Goleta Water Dist.*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978).

The rule that an inverse condemnation claim for denial of access can only arise where government interferes with existing access rights is not unique to California. Quite the contrary, it is the generally accepted rule. In *Johnson v. United States*, 479 F.2d 1383 (Ct. Cl. 1973), for example, the government constructed a barrier between the claimant Johnson's then-vacant property and the highway in order to facilitate the construction of a nearby customs inspection and immigration facility. Johnson had intended to construct a motel on the obstructed property. Because Johnson's property did not enjoy access to the highway at the time the barrier was constructed, the court found that no cause of action based on a denial of access had been stated:

[T]he landowner cannot complain of a taking of that which he never had and the Sovereign refuses to give because the general public interest is best served by such denial. *Id.* at 1392.

See also *Ruston v. State*, 25 A.D.2d 944, 270 N.Y.S. 2d 515 (1966); *Department of Public Works v. McBee*, 22

Ill. 2d 202, 174 N.E.2d 801 (1961); *Pennysavers Oil Co. v. State*, 334 S.W.2d 546 (Tex. Civ. App. 1960).⁴

So here, Appellant cannot state a valid claim for denial of access because its property never enjoyed access to Cowell Boulevard. The City, in deciding not to extend the public street or to accept dedication of the connecting property, did not deprive Appellant of any right it had previously enjoyed. The City simply exercised its discretion and concluded that the public interest would be better served if Cowell Boulevard were not extended so as to create the new access that Appellant hoped would increase the value of its farmland.

4. Appellant Has Alleged, At Most, a "Unilateral Expectation" and Not a Protectable Property Right.

Appellant cannot convert its unilateral desire or hope of securing an extension of urban services into a protectable property interest. This Court has rejected the notion that such expectancies are protected by the Fifth Amendment:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire to have it. He must have *more than a unilateral expectation of it*. He must instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. at 572 (emphasis added).

Appellant's property remains as it was when Appellant purchased it. Like the owners of Grand Central Station,

⁴ The cases cited by Appellant are not to the contrary. They all involve property owners with existing access, not merely a hope of future access. *United States v. Welch*, 217 U.S. 333 (1910) and *United States v. Smith*, 307 F.2d 49 (5th Cir. 1952), were cases involving federal condemnation of land that currently provided access. *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959), involved existing access to seaplane landings, which was cut off by a federal regulation prohibiting such flights. *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978), involved the cutting off on an existing access by construction of a new freeway.

[A]ppellants may continue to use the property precisely as it has been used for the past 65 years.
...."

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 136 (1978). It is unimproved farmland and quite as usable as any other unimproved farmland.

Appellant alleges no more than the "deprivation" of speculative future profits which it hoped to make and which it believes would be more easily realized if the public would provide urban services to its property. Appellant's speculative expectation of development profits, however, is simply not a constitutionally protected property interest:

[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Andrus v. Allard, 444 U.S. 51, 66 (1979).

5. Unlike Other Cases Recently Decided by This Court, This Case Involves Neither a Physical Nor a Regulatory Restriction on the Use of Appellant's Property.

Not only is there an absence of any physical property restriction in this case, *cf. Andrus*, 444 U.S. 51, there is also an absence of any regulatory restriction. This case thus lacks the element that has been central to all of this Court's recent cases discussing the scope of the "taking issue." All of those cases involved situations in which the value of property had been *decreased* by a regulation limiting the use of the property in the name of protecting the public health, safety or welfare. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S.

621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In those cases the issue was whether the limitation on use and value was justified by the public welfare considerations asserted in defense of the regulation.

This case involves nothing of the sort. The question here is not whether a public regulation bears too heavily on Appellant's property rights. The question is whether a failure to spend public money in the way Appellant would like it to be spent has resulted in the value of its property *not being raised* to a level Appellant "expected." The question here is not balancing private loss against public gain. The question is allocation of limited public resources among competing public needs.

B. Appellant Has Not Pled a Denial of Any Alleged Protectable Property Interest Amounting to a Taking Under This Court's Precedents.

Even if Appellant had pled, or could plead, a protectable property right, it has not pled a "taking" of any such right. Appellant attempts to plead such a taking by trying to analogize its situation to those cases in which this Court has suggested that a taking might be found where the government has either (1) denied the property owned any economically viable use of its property, (2) unduly interfered with the property owner's reasonable investment-backed expectations, or (3) destroyed a specific property interest that was essential to the use or economic value of the property. Appellant has failed to state a cause of action under any of these theories.

1. Appellant Has Not Been Denied the Economically Viable Use of Its Land.

Appellant has failed to allege that its land has no economically viable use. The record shows that in fact the land is being used for an economically viable purpose. Moreover, even if lack of economic viability were to be

assumed for purposes of argument, that lack would not be the result of any action by the Respondents.

a. The Complaint Fails to Allege That the Land Has No Economically Viable Use.

Under California law, a demurrer admits only those facts that are properly alleged in the complaint. It does not admit conclusory allegations or legal arguments. *Serrano v. Priest*, 5 Cal. 3d 584, 591 (1971); *HFH Ltd. v. Superior Court*, 15 Cal. 3d 508, 511 (1975); *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 105-06 (1976); *Pan Pacific Properties, Inc. v. County of Santa Cruz*, 81 Cal. App. 3d 244, 251 (1978). Under this standard, the Appellant's complaint is grossly deficient in its allegations regarding the economic viability of its present use of its land.

The complaint never even says what the present use of the land is.⁵ Nor does the complaint allege that the current use of the property is unprofitable.⁶ Nor does the complaint disclose the amount paid for the property—only that it was purchased for good and valuable consideration. (J.A. 43) The complaint concedes that part of the property has already been sold to the State of California but avoids any mention of the economic impact of that transaction.⁷ Appellant has been careful *not* to

⁵ The complaint carefully refrains from describing the present use of the property. It alleges that the property is "not suitable for" agricultural uses but does not specify whether the property is being so used. (J.A. 45)

⁶ Appellant objected to discovery relating to its income from the property as "ambiguous and perhaps irrelevant", and provided only self-serving argument (J.A. 13-17). The complaint alleges that certain factors "would make cultivation economically unprofitable" (J.A. 45) but in alleging that the property cannot be utilized for any "beneficial" purposes it cites only those acts of the respondents that purportedly inhibit residential development. (J.A. 46).

⁷ Appellant's specific allegation is that "the fertile topsoil was removed from the property for use in constructing interstate 80." (J.A. 45) This is an example of the oblique phrasing with which appellant glosses over facts adverse to it. Presumably, either the

allege that the property is *not* useable agricultural land.⁶ All of these facts are obviously within Appellant's knowledge and could easily have been alleged had there been any serious factual basis for a claim of lack of economic viability. Appellant has instead relied on conclusory allegations that are clearly insufficient to state a claim under California law.

Even under federal § 1983 pleading standards Appellant's complaint fails. A conclusory allegation of lack of economic viability does not state a claim if the complainant declined to allege the supporting facts available to it in its complaint. The federal circuits are in agreement that conclusory allegations fail to state a civil rights cause of action. See e.g., *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979); *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2d Cir. 1972), cert. denied, 410 U.S. 944 (1973); *Cohen v. Illinois Institute of Technology*, 581 F.2d 658 (7th Cir. 1978), cert. denied, 439 U.S. 1135 (1979); *Finley v. Rittenhouse*, 416 F.2d 1186 (9th Cir. 1969).

appellant or its predecessors in title sold some topsoil to the state. We are not told how much compensation was received by appellant, if any, or whether the appellant purchased distress property from which the topsoil had already been removed.

* Paragraph 11 and Paragraph 26 contain the allegations relating to potential agricultural use of the property. (J.A. 45, 52). It is alleged that the property is not "suitable" for such use because the topsoil has been removed, the soil is infested with nematodes, and that the proximity of developed land "would make cultivation economically unprofitable" because it inhibits fertilizer application. Even assuming the truth of these allegations, they do not add up to an allegation that the property is not or cannot be profitably used for agricultural purposes. Many agricultural operations can be profitably performed without topsoil and despite the existence of nematodes and neighboring residential developments; allegations that these facts have an adverse impact on agricultural use do not constitute allegations that the property is not and cannot be profitably used for agricultural purposes, and an allegation that they *would* (using the future tense) make "cultivation" (which is only one of many types of agricultural uses) "economically unprofitable" does not allege that the property is not and cannot be profitably used for agricultural purposes.

As noted by one federal court:

In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

Valley v. Maule, 297 F. Supp. 958, 960 (D.Conn. 1968). Cf. *Baldwin County Welcome Center v. Brown*, 104 S.Ct. 1723 (1984). Appellants are not handicapped or underprivileged persons deserving of special treatment. They are investors who chose to put their money in undeveloped real estate, traditionally one of the riskiest of investments. There is no policy reason for excusing these complainants from proper pleading practices—especially when one suspects that the words of the complaint are carefully chosen to mask facts adverse to the espoused claim.

b. *The Record Before This Court Shows That Appellant's Land is Devoted to an Economically Viable Agricultural Use.*

Assuming for purposes of argument that Appellant's complaint has plead an absence of beneficial use, the undisputed facts in the record contradict such an allegation because they show that the property has been consistently used for agricultural purposes.

The reason for the careful phrasing of Appellant's complaint becomes apparent upon examination of the record before this court. In its denial of Appellant's proposed subdivision map, Yolo County specifically found that the project would result in the removal of 40 acres of prime agricultural land and current agricultural crops on the project site.⁹ Under California law, a party who

⁹ The county's findings are contained in the Environmental Impact Report and were adopted by reference by the Board of Supervisors. J.A. 72.

seeks to collaterally attack an administrative decision is bound by such findings. *People v. Sims*, 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982). In any event, the county's finding that the property is being used for agricultural purposes was based on the draft environmental impact report submitted by Appellant itself.

The economic viability of an agricultural use of land—or any other use of real estate—cannot be judged on its immediate profitability in any given year. This Court can take judicial notice of the fact that agriculture has historically been subject to cyclical economic swings and that at the present time the agricultural segment of the economy is suffering substantial distress. If a constitutional claim based on deprivation of economic viability can be shown by proving unprofitability in any given year, there will be few agricultural properties that will not be able to make such a claim at some point in time. Indeed, the owners of many major office buildings in the City of Houston (where there is no zoning) could sustain a taking claim if judged by that standard at this particular moment in history.

Appellant may believe that the sale of lots for residential purposes is a more "suitable" or "beneficial" use for its land than the production of agricultural commodities. But if every owner of farmland who would like to be a developer can state a constitutional claim by merely alleging that agriculture is not "suitable" or "beneficial," then the courts of this country will be deluged with such claims. Like the "subjective" inquiries into the motivation of public officials, which this Court determined to be incompatible with its admonition that insubstantial claims should not proceed to trial, trials based on a property owner's subjective judgment of "suitable" and "beneficial" use would be "peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

c. *If Appellant's Use of its Land Lacks Economic Viability it is Not Respondent's Fault.*

Even assuming for purposes of argument that the Appellant's land has no "economically viable" use, the Appellant has not alleged that the actions of the Respondents caused the absence of an economically viable use. On the contrary, the allegations of the complaint suggest that the absence of economic viability is the result of factors for which the Respondents bear no responsibility whatsoever.

Specifically, as to a potential agricultural use, the Respondents did not acquire the topsoil on appellant's land; the topsoil was conveyed to the State under threat of condemnation. Appellant or its predecessors in title presumably received the compensation due under California condemnation law. Such compensation would include not only the value of the topsoil but any damage to the remainder of the property, such as any loss of its value for agricultural purposes. *People ex rel Department of Public Works v. Hayward Building Materials Co.*, 213 Cal. App. 2d 457, 28 Cal. Rptr. 782 (1963); *City of Salinas v. Homer*, 106 Cal. App. 3d 307, 165 Cal. Rptr. 65 (1980); *American Savings & Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). Appellant does not accuse the Respondents of causing the purported nematode infestation—presumably that was the result of natural causes.

As to potential urban use, the Appellant voluntarily purchased farmland that lacked access to urban services. Appellant does not accuse Respondents of taking away services that once existed. Appellant's land has as much potential for urban use now as it did when it was acquired.

This Court has never held that the Constitution provides a welfare program for real estate speculators—guaranteeing them a profit on any piece of vacant land they might acquire. In *Kirby Forest Industries, Inc. v. United States*, 104 S.Ct. 2187 (1984), in which the property owner complained of the government's failure to

immediately advance funds for land it proposed to acquire in the future, this Court said that "impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking." *Id.* at 2197. If anything, this Court's decisions suggest only that if land is being used for an economically viable purpose, a regulation that makes a continuation of such use impossible is subject to careful examination. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). But if a person buys land having adverse physical circumstances that make profitability difficult, the Government is not required to guarantee that it will permit a use of the land that will allow profitability despite such adverse circumstances. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

Once again, the basic fact that emerges is that Appellant gambled on a marginal piece of property and now wants a government bail out. Despite the carefully circumscribed allegations of the complaint, the record is clear that the property is currently useful for and being used for agricultural purposes. At most, Appellant can allege that it is not the most ideal piece of agricultural land in California. That, however, is not enough to show that the property has no economically viable use. Appellant is really demanding a form of local welfare that guarantees it profitability despite adverse conditions over which the local governments have no control—conditions that were either known to Appellant at the time of its purchase or constitute part of the normal risks for anyone purchasing similar property.

2. The County Has Not Unconstitutionally Interfered With Appellant's Reasonable Investment-Backed Expectations.

Appellant also seeks to bring its claim within the ambit of those cases that have discussed the taking issue in terms of government interference with reasonable investment-backed expectations. Appellant, however, lacks the type of property interest necessary to trigger an invest-

ment-backed expectations analysis. Furthermore, even if such an analysis were to be made, Appellant has failed to plead facts showing a basis for a successful claim under such an analysis.

This Court has analyzed potential takings on the basis of an investment-backed expectations analysis only in those situations in which the litigant possessed a specifically defined interest in a particular use or aspect of property, not in those situations in which the litigant had a broadly based interest in the property as a whole. In his early article on investment-backed expectations analysis, Professor Frank Michelman described the issue as whether the regulation destroyed "a discrete twig out of the [the owner's] fee simple bundle to which [he] makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystalized expectation" Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 HARV. L. REV., 1165, 1230-34 (1967).

Subsequent decisions of this Court have used investment-backed expectations analysis only in situations in which the property interest in question was a distinctly perceived and sharply crystalized expectation. In the leading case of *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984), the Court used investment-backed expectations analysis in a case in which the property in question was a trade secret—an intangible property interest specifically recognized as such by federal law. *Id.* at 2872-74. The Court declined to use an investment-backed expectations analysis in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), a case in which the anticipated development of air rights was frustrated, but the claimant owned the entire fee simple. The Court said that the ban on air rights development "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 125. See also *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

In the instant case, Appellant owns fee simple title to 167 acres of farmland, composed of the 44 acre subject property and adjacent acreage. It has not carved out a narrowly defined and distinctly crystalized interest in that property and made the kind of investments on the basis of such an interest that would justify an investment-backed expectations analysis. See Michelman, *supra* at 1234.

If an analysis based on investment-backed expectations were to be performed, however, it would show that any expectation that Appellant could subdivide its property at a specific time in a specific manner was merely a "unilateral expectation or an abstract need" rather than a reasonable, investment-backed expectation. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). In the *Ruckelshaus* opinion, this Court drew a clear line between protected and unprotected expectations. This Court held that Monsanto's disclosure of trade secrets to the government, in reliance on the Trade Secrets Act's prohibition of publication by a government employee of such secrets, created "no reasonable expectation" that "the government would not use the data [Monsanto] had submitted when evaluating the application of another." 104 S. Ct. at 2877 n.14. On the other hand, during the period of time when the statute gave "explicit assurance that [the government] was prohibited from disclosing publicly, or considering in connection with the application of another," any trade secrets submitted to it, this "explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.*, at 2877.

Appellant's request that Yolo County approve a specific subdivision proposal is much more abstract and unilateral than Monsanto's hope that the government would interpret the Trade Secrets Act to prevent disclosure of Monsanto's trade secrets in the course of the government's evaluation of other companies' products. In the instant case there has never been any representation by the Respondents that might have led to the "fruition" of reasonable ex-

pectancies regarding its proposed subdivision map. See *Kaiser Aetna, Inc. v. United States*, 444 U.S. 164, 180 (1979).

Appellant argues in its brief that the Respondents took "definitive and precise action over many years to encourage the commitment to residential development that owner made," citing "J.A. 44, 46-48" (p. 14). But the cited pages of the Joint Appendix contain only the paragraphs of the Appellant's complaint in which it alleges that the county zoned the property for residential purposes and that the city and county originally supported the construction of a particular sewerage facility that, if funded, might someday serve the property. No reasonable developer would expect that such actions would guarantee approval of a particular subdivision map. Indeed, "if the degree of government regulation determines the reasonableness of an expectation . . .", *Ruckelshaus*, 104 S. Ct. at 2883 (O'Connor, J., concurring in part and dissenting in part), Appellant's alleged perception of a hostile regulatory climate in California over the past 25 years belies any claim that it could have reasonably expected approval of any particular development. (See Appellant's brief, pp. 18-20).

This Court recently considered a case in which the property owner had a far more credible claim that its expectation of subdivision approval was reasonable. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108 (1984), a landowner claimed a taking of its expectation interest in the approval of a specific subdivision scheme. This Court pointedly noted that it need not reach the question whether the jury's verdict that the expectation interest had been taken "can stand in light of the absence of any discussion in the jury instructions about the reasonableness of the alleged expectation interest." *Id.*, at p. 3119 n.12. In that case the property owner had at least submitted subdivision plans that had been given some degree of preliminary approval by the local planning com-

mission. No such approval was ever granted in the instant case. Indeed, Appellant characterizes the county's actions as evidencing a pattern of practice designed to discourage such applications. (Appellant's brief, pp. 5-6) Without accepting the truth of such characterization, if it accurately reflects the Appellant's *perception* of the governmental attitude, it is inconceivable that Appellant could have simultaneously formed a reasonable expectation that its subdivision would be approved.

3. The City's Refusal to Extend an Existing Street 1300 Feet to Appellant's Proposed Subdivision Does Not Violate Any Federal Constitutional Right.

Appellant argues that "both federal and California cases recognize" that a property owner has a "right of access to adjacent or neighboring streets and that deprivation of that access is a taking." (Appellant's brief pp. 14-15) As already noted, however, neither the federal nor the California cases cited by Appellant stand for the proposition that Government must provide new access where it did not previously exist. See *supra* p. 10, n.4.

Even if it were assumed, however, that the Appellant's bundle of sticks included a federally guaranteed right that the local government would extend streets to its property, a mere allegation that it has been deprived of that right would not allege a taking of its property under the modern decisions of this Court. This purported right *not* to exclude others would have no higher ranking than the "right to exclude others" that was at issue in *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). In that case this Court found that the property owner failed to demonstrate that the right to exclude others was "so essential to the use or economic value of its property that the State-authorized limitation of it amounted to a 'taking.'" *Id.*, at p. 84.

In the instant case, Appellant's complaint is fatally flawed by its failure to allege that the access is essential to the use or economic value of its property. Appellant's third cause of action appears to assume that a deprivation

of access is taking *per se* (J.A. 62). But Appellant is not claiming that Respondents permanently physically invaded its property in a way that might constitute a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Appellant's claim is almost the exact opposite—that Respondents have refused to invade Appellant's property by extending public streets across it. Even if there were a right to such a street extension, it would be only one of those rights, the impairment of which must be evaluated in light of its overall effect on the use and value of the property. As in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), Appellant does not allege that when so viewed, the loss would constitute a taking of the property as a whole.

C. This Court Cannot Reverse the Decision of the California Court of Appeal Without Interfering with Legislative Decisions to Which it Has Traditionally Shown Great Deference and Opening The Federal Courts to a Flood of Routine Local Land Use Disputes.

Unless this Court is prepared to have federal courts across the land become the arbiters of public infrastructure decisions and the keepers of the local public fisc, it must sustain the California court's dismissal of this complaint—not only because it fails to plead the essential elements of a taking claim, but also because the issues raised by it are totally inappropriate for judicial "second-guessing." See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

1. Appellant's Call for a Return to Lochner-Type Judicial Intervention Should be Rejected.

Appellant invites this Court to resurrect substantive due process under the new name of "the taking issue." Before this Court can say that Appellant has stated a cause of action, it must—either expressly or *sub silentio*—invalidate the decisions of the City of Davis concerning where its municipal boundaries should end, how it should allocate its public improvements budget and whether it

wishes to become the owner and maintainer of an extended system of public streets, sewers and water mains.

This Court has long and repeatedly, determined that such questions are not the proper subject of federal judicial review. In the words of Justice Douglas:

We deal with economic and social legislation where legislatures have historically drawn lines which we respect . . . if the law be "reasonable, not arbitrary" (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed v. Reed*, 404 U.S. 71, 76

Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

This Court's traditional deference to legislative decisions about land use regulation pales in comparison to the all-but-absolute refusal of this and other courts to become involved in assessing the wisdom of, and justification for, legislative decisions about whether or not public improvements should be constructed and municipal services should be extended. As a matter of California law, it is certainly clear that local legislatures have the right to correlate their public service decisions with their land use decisions. *Associated Homebuilders v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 419 (1976). The same principle is recognized in other states. See, e.g., *Golden v. Planning Board of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972); *Moviematic Industries Corp. v. Board of County Commissioners*, 349 So. 2d 667 (Fla. App. 1977).

When the legislative decision is against an extension of public services, courts will not intervene to require a different decision. *Vicksburg v. Vicksburg Water Co.*, 202 U.S. 453, 471-72 (1906) ("this exercise of this authority [to decide whether or not 'to extend the sewer and construct an outlet therefor'] is primarily vested in the municipality and not in the courts"); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962 (N.D.

Cal. 1980) (city not required to extend sewer line to developer's property); *State ex rel. Holifield v. Sewerage and Water Board*, 108 So. 2d 277 (La. App.), cert. denied, 361 U.S. 817 (1959) (city would not be ordered to extend sewer 900 feet to serve undeveloped area); *Mississippi State Highway Commission v. Spencer*, 233 Miss. 155, 101 So. 2d 599 (1958) (court without authority to compel commission to build bridge because decision was within the discretion of the Board); *Seay v. Louisville*, 259 Ky. 64, 67-68, 82 S.W.2d 212, 214 (1935) ("a city cannot be compelled to exercise its discretion with regard to the construction or maintenance of a sewer system. . . .") and *Moore v. City Council*, 32 Ky. 384, 105 S.W. 926 (1907) (city would not be ordered to extend main one mile to serve farmer who claimed right to same services as given to other city taxpayers).

The rationale for this deference is obvious. Public improvements cost money—both to build and to maintain. Furthermore, such public improvement expenditures generally serve as a catalyst for additional development, which in turn costs more money to support with further public improvements and services. This is the same money that is available for other capital projects, for increased services in other areas, for social and economic development programs, and for tax reductions. There is only so much money to satisfy all of the competing public demands. In addition, of course, any such decision also necessarily impinges on important, nonfinancial policies relating to matters such as community character, pollution control, preservation of open space and farmland, redevelopment of older areas already served by public infrastructure, and prevention of urban sprawl.

This Court has not been so bold as to assert a constitutional mandate to become involved in such matters:

[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Dandridge v. Williams, 397 U.S. 471, 487 (1970). Or, as a state court has put it:

While a Damoclean sword of liability for damages to undeveloped land might encourage municipalities to build sewers, and thus serve as a beneficial spur, the same rationale might be applied to encourage the building of highways and streets, railroad facilities, airports, sidewalks, and hundreds of other governmental improvements, in effect stripping municipal officers of their discretionary power over the desirability and timing of public construction. More important, the prospect of tort liability might impede equally desirable governmental regulation and legislation since municipal officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline, legislation. . . . *The courts should not use the threat of money sanctions to whip government into providing municipal improvements.*

Charles v. Diamond, 41 N.Y.2d 318, 331-332, 360 N.E.2d 1295, 1305 (1977) (emphasis added). See also *Barney's Furniture Warehouse, Inc. v. City of Newark*, 62 N.J. 456, 469, 303 A.2d 76, 83 (1973) and *Reid Development Corp. v. Parsippany-Troy Hills Township*, 31 N.J. Super. 459, 464, 107 A.2d 20, 23 (1954). This Court, and all other courts in this country, have traditionally refused to be drawn into disputes over the extension of public services. Appellant's invitation to abandon that wise policy should be summarily rejected.

2. *The Policies Attributed to Respondents Are Deserving of Support.*

The "no growth" innuendo that Appellant constantly seeks to inject into this case adds nothing to Appellant's failed attempt to state a cause of action. Nor should it cause this Court to abandon its traditional deference to legislative decisions concerning such matters. This Court has, more than once, sought to put to rest any notion that the Constitution frowns upon local decisions that

seek to guide, direct and limit the use and development of land in the general public interest:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation

* * * *

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 32-33 (1954) (emphasis added).

More recently, Justice Powell speaking for a unanimous Court expressly approved the types of policies that the Appellant here seeks to paint as constitutionally (and, it seems, morally) sinister and invalid:

In this case, the zoning ordinances substantially advance legitimate governmental goals. *The State of California has determined that the development of local open-space plans will discourage the 'premature and unnecessary conversion of open-space lands to urban uses.'* Cal. Govt. Code Ann. § 65561(b) (West Supp. 1979). The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. *Such governmental purposes have long been recognized as legitimate.*

Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (emphasis added). Premature conversion of land to urban uses poses an obvious threat to environmentally sensitive lands. Moreover, a program of growth management benefits both urban residents, who will avoid the excessive cost of premature extensions of public facilities, and farmers, whose ability to continue to farm will be protected from conflicting urban uses. Robert E. Coughlin & John C. Keene, *National Agricultural Lands*

Study: The Protection of Farmland: A Reference Guidebook for State and Local Government 200-01 (Wash. D.C., U.S. Dept. of Agriculture) (1981). See also American Farmland Trust, *Eroding Choices, Emerging Issues: The Condition of California's Agricultural Land Resources* 94 (1986). This Court has wisely avoided judicial reexamination of local policies designed to manage growth in the public interest.

3. *Judicial Intervention in Municipal Service Decisions Would Produce a Flood of Litigation.*

This Court's reluctance to become involved in such matters evidences not only its regard for the separation of powers doctrine but also its concern for limiting the jurisdiction of federal courts to matters of sufficient importance to justify that jurisdiction. If the complaint in this case is found to state a cause of action, there will be no way to stop a flood of routine state land use cases from pouring into the federal court system. As Justice Powell commented in his concurring opinion in *Parratt v. Taylor*:

First, the existence of the statutory cause of action means that every expansion of constitutional rights will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend other significant rights. Second, every [such] expansion . . . displaces state lawmaking authority by diverting decisionmaking to the federal courts.

Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring) (quoting Whitman, *Constitutional Courts*, 79 Mich. L. Rev. 5, 25 (1980)).¹⁰

Zoning and land use cases now congest state court dockets. Several courts of appeal have recognized, and

¹⁰ See also *Owen v. City of Independence*, 445 U.S. 622, 670 (Powell, J., dissenting) (1980) "By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it."

restricted, the danger of being too ready to find a federal constitutional cause of action in what is nothing more than a local zoning dispute. As the Court of Appeals for the First Circuit recently observed:

Every appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused, or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give the state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under Section 1983.

Creative Environment, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1981), *cert. denied*, 459 U.S. 989 (1982) (emphasis in original, citations omitted).¹¹

In this case, a state court mandamus remedy is available (and is already being pursued by Appellant) to test the validity of the land use decision under state law. Inverse condemnation in the state courts is available to raise the question of whether the alleged "denial of access" has deprived Appellant of any property right recognized by state law.

The California Court of Appeal has properly determined that Appellant has no right to challenge the discretionary decision of the City of Davis not to extend the types of public improvements necessary to allow Appellant to put its farmland to the specific, intense urban use for which Appellant sought approval from Yolo County. In the absence of such services, the County's denial of subdivision approval was unquestionably proper. The decision below should be affirmed.

¹¹ See also *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985); *Albery v. Reddig*, 718 F.2d 245, 251 (7th Cir. 1983).

CONCLUSION

If this Court finds that the Fourth Amended Complaint states a cause of action, it must expect that real estate speculators across the land will take that decision as an invitation to have the federal judiciary save them from their own bad investments. Local governments will then either agree to spend public money to make subdivisions bloom on farms and swamps or they will be forced to pay public money in damages for their refusal to do so. The prior decisions of this Court require no such decision in this case. Indeed, they require the opposite.

Amici are organizations deeply interested in the avoidance of unplanned and illogical extensions of urban services into areas properly preserved for their farmland, open space or environmental value. Amici, therefore, urge the Court to affirm the decision of the California Court of Appeal and to hold that no "taking" cause of action can be stated based solely on an allegation that a local government has exercised its plenary discretion to decide not to extend such services to a previously unserved area.

Respectfully submitted

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APPENDIX

The interests of Amici are as follows:

1. The American Farmland Trust (AFT) is a non-profit corporation organized in 1980 to encourage the conservation of agricultural land and water resources through public education, policy research and technical assistance to officials, and the demonstration of private real estate techniques. The AFT professional staff has been a consultant to many state and local governments in their adoption of both compensatory and non-compensatory approaches to land-use management. AFT's latest publication, *Eroding Choices: Emerging Issues* (1986), is an in-depth analysis of the sufficiency of agricultural land resources in the State of California. AFT has 35,000 members nationwide.

2. The National Audubon Society ("NAS") is a nationwide membership organization with over 500 chapters and 550,000 members. NAS' goals including working for policies that encourage environmentally and economically sound land and water resource planning at the national, state, and local levels and promoting environmentally sensitive development and rehabilitation in our cities. NAS has over 60,000 members in California and permanent offices in Sacramento and Ventura as well as a number of sanctuaries and nature centers in the state.

3. The Sierra Club is a nonprofit corporation organized in 1892 and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California. The Sierra Club is a national conservation organization of more than 350,000 members. The Sierra Club was organized to study, protect, explore and enjoy natural and scenic resources and to practice and promote the responsible use of the earth's ecosystems and resources. Sound land-use planning is one of the Sierra's Club's most important goals.

4. The Natural Resources Defense Council, Inc. (NRDC) is a nonprofit, membership corporation organized under the laws of New York State, with offices in New York, New York; Washington, D.C.; and San Francisco, California. NRDC has approximately 48,000 members residing in all states of the United States. NRDC is dedicated to preservation and protection of the human environment. One of NRDC's principal areas of involvement has been in the protection and wise management of the nation's land resources. For example, NRDC has worked for passage and implementation of a number of state wetland and coastal protection statutes. NRDC also has participated in a number of cases in support of local and state land-use controls which have been challenged on "takings" grounds. Because of the importance of the "taking" issue raised in this case, NRDC and its members have a direct interest in this litigation.

5. The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private, nonprofit organization to protect and defend America's historic resources. The National Trust's congressional mandate is to further the historic preservation policy of the United States and to preserve sites, buildings, and objects significant in American history and culture. 16 U.S.C. § 468; *see id.* §§ 461-467. The National Trust has approximately 160,000 individual members and 1500 member organizations involved in regional and local preservation activities. The National Trust's expertise on land-use policy issues and rural conservation has been widely recognized. Included among the National Trust's activities, for example, is a program dedicated to promoting rural conservation. The Trust has a vital interest in zoning and land-use regulation as essential tools to encourage preservation and conservation in the land-use planning process.

6. The Environmental Fund is a nonprofit membership organization of over 4000 members concerned primarily with the effects of population growth on the

environment of the United States. Land-use planning is an important tool in the regulation of the adverse environmental impacts of growth. If the issues presented in this case are decided adversely to the Respondents, it would have a chilling effect on the ability of government to regulate in the public interest and would cripple the land-use planning process.

AMICUS CURIAE

BRIEF

15
No. 84-2015

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES,
A PARTNERSHIP,

Appellant,

v.

THE COUNTY OF YOLO
AND THE CITY OF DAVIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF CALIFORNIA

**BRIEF AMICUS CURIAE OF THE NATIONAL
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 84-2015

MACDONALD, SOMMER & FRATES,
A PARTNERSHIP,

Appellant,

v.

THE COUNTY OF YOLO
AND THE CITY OF DAVIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF CALIFORNIA

**BRIEF AMICUS CURIAE OF THE NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS
JOINED BY THE CITY OF LOS ANGELES IN
SUPPORT OF APPELLEES COUNTY OF YOLO
AND THE CITY OF DAVIS, CALIFORNIA**

INTEREST OF THE AMICUS CURIAE

This brief Amicus Curiae is filed pursuant to Rule 36 of the rules of the Court on behalf of the more than 1,800 local governments that are members of the National Institute of Municipal Law Officers (NIMLO), and is joined by the City of Los Angeles, California in support of the Appellees in this case, the County of Yolo and the City of Davis.

The members of NIMLO are state political subdivisions. NIMLO is operated by the chief legal officers of its members variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. The Appellee City of Davis, and the City of Los Angeles which joins NIMLO in this brief are members of NIMLO. The accompanying brief is signed by the authorized law officer of each City named above which are political subdivisions of its respective state there named, both on behalf of NIMLO and on behalf of each of their cities.

The attorneys who operate NIMLO for their local governments are responsible for advising their local governments on ways to best use the land that is within their municipality's authority to provide maximum benefits for all of its residents. Traditionally, courts have given governments great latitude in devising broad schemes for the use of land within their control. This Court has recognized the authority of municipal governments to use their police powers to designate such restrictions on the use of land as they deem necessary to protect the health, safety, and welfare of their residents. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). A decision by this Court that would make carefully thought-out land use decisions made by the entities most able to make such decisions subject to constitutional and statutory damage claims, would severely restrict a municipality's exercise of its police power for the protection of its residents. It would also expose local governments to liability every time they make a land use judgement unfavorable to the interests of a present or potential landowner. Similarly, if this Court permits the assertion of damage claims for "temporary takings" by way of 42 U.S.C. §1983, the floodgates of litigation will be opened and the ability of local governments to effectively manage the land within their boun-

daries will be effectively nullified. The resultant strain on local government treasuries would be substantial and would undoubtedly affect the provision of important governmental services.

The member cities of NIMLO and the City of Los Angeles will be directly affected by a decision of the Court that the actions taken by the County of Yolo and the City of Davis constitute a taking in violation of the Fifth Amendment to the Constitution. Likewise, a decision by this Court allowing potential plaintiffs to challenge a local government's land use decisions under 42 U.S.C. §1983 will expose such governments to continued liability which would severely drain the government's financial resources and curtail the provision of vital governmental services.

Amicus therefore urges the Court to hold that the actions taken by Appellees did not constitute a taking in violation of the Fifth Amendment and that such claims are not actionable under Section 1983. Consent to the filing of this brief has been given by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF THE ARGUMENT

This brief Amicus Curiae is filed by NIMLO and joined by the City of Los Angeles, California, in support of the right of local governmental authorities to exercise their police powers to devise and implement broad schemes for the use of land within their boundaries without being subjected to claims of a regulatory taking without compensation by landowners who are denied the ability to use the land in a manner at odds with the governmental plan.

This Court has recently held in *Williamson County Regional Planning Commission v. Hamilton Bank of*

Johnson County, ___ U.S. ___, 105 S.Ct. 3108 (1985), that a case involving an alleged taking without compensation of private property due to government regulation is not ripe for judicial review until a final decision regarding the application of a zoning regulation to the property at issue is made. This Court also noted in *Williamson County* that a taking by regulation claim is not ripe until the plaintiff has exhausted all state procedures for receiving compensation. Amicus asserts that *Williamson County* is dispositive in this case where Appellant has not demonstrated that it has followed the procedures established by the state for receiving compensation. Nor has Appellant developer shown that a final decision regarding the use of the property has been made. Amicus therefore asserts that Appellant's claim for damages resulting from a governmental taking of its private property is invalid.

If this Court finds that a final determination has been made at the state level with regard to the property at issue and that a taking did result from the governmental regulatory action, Amicus urges the Court to adopt the analysis used by Justice Stevens in his concurring opinion in *Williamson County*. In that opinion Justice Stevens characterizes takings of private property by governmental regulation as either permanent or temporary. If a taking is permanent, Justice Stevens would award compensation to the plaintiff, if it is characterized as temporary, however, the appropriate remedy would be invalidation of the regulation. Amicus believes that Justice Stevens' analysis is appropriate in cases such as the one at issue and should be adopted by this Court.

Finally, Appellant does not have an actionable claim under 42 U.S.C. §1983 because the deprivation of a constitutional right that that statute requires is not present in this case.

For the foregoing reasons, NIMLO urges the Court to affirm the denial of Appellant's petition for a hearing by the Supreme Court of California, and the judgement of dismissal of the California Court of Appeal, Third Appellate District.

I. UNDER THE FACTS OF THIS CASE, NO REGULATORY TAKING UNDER THE FIFTH AMENDMENT HAS BEEN SHOWN

On October 15, 1982, Appellant, MacDonald, Sommer and Frates, a partnership, appealed to the Court of Appeal Third Appellate District, from a judgement of the Yolo County Superior Court sustaining a demurrer to its complaint without leave to amend. The Court of Appeal filed its opinion on January 24, 1985, which was not certified for publication.

Appellant petitioned for a hearing before the Supreme Court of California. The Petition was denied by order dated April 3, 1985 at which point the proceedings became final in the California state courts.

A Notice of Appeal to this court was filed with the California Court of Appeal (which retains possession of the record in this case) on June 26, 1985. The rather complicated procedural history of this case is set out in full in the Joint Appendix at pages 3-6.

Appellant, MacDonald, Sommer & Frates, a partnership, urge this Court to award it damages for the alleged unconstitutional regulatory taking of its property by the County of Yolo and City of Davis through the denial of an intensive residential development plan submitted by the Appellant. In 1971, the Appellant became the owner of a 44-acre parcel of agricultural property lying within an unincorporated area of the county situated east of the city.

In addition, the Appellant is the owner of a fifteen acre rectangular strip of property located partially in the city and connecting to the forty-four acre single-family and multiple-residential parcel by the county. In 1974, the city revised its general plan to make Appellant's property an agricultural reserve except for a portion of the connecting strip of land located within the city limits. Prior to June 14, 1977, the Appellant submitted a tentative subdivision map to the county for the property. Following hearings and review, the Appellant's tentative subdivision map was denied by the county's board of supervisors on June 14, 1977.

In addition to having filed a fourth amended complaint on October 27, 1981 seeking damages for inverse condemnation, denial of access and deprivation of civil rights under 42 U.S.C. §1983, the Appellant filed a separate lawsuit seeking to overturn the Board's action by writ of administrative mandate. This action for mandamus still is pending before the trial court. (See Appellant's Jurisdictional Statement A-7).

Whether a local regulation that accomplishes a "taking" constitutionally requires an award of compensation as a remedy is an issue whose resolution has been anticipated since this Court decided *Agins v. Tiburon*, 447 U.S. 2578 (1980). Most recently, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, ___ U.S. ___, 105 S.Ct. 3108 (1985), this Court was unable to reach the question because it did not believe that the Appellant bank had obtained a final decision regarding the application of the zoning and subdivision regulation to its property and because the bank had not used the procedures provided under Tennessee law for obtaining compensation. The Court reasoned that the case was not ripe for review because there was no certainty that the

Planning Commission would refuse to permit the development that the Bank had sought or any economically viable use of the property. The Court found that it would have been possible for the Board of Zoning Appeals to grant variances with respect to at least five of the eight objections that the Commission had to the proposed development plan. Because the Bank had not sought those variances, there had not been a final determination that the regulations which were claimed to result in a "taking" of the bank's property would in fact be the restrictions that would apply to the development of the land.

In addition, the Court said that the bank's claim was not ripe for judicial review because it had not used state procedures for securing compensation. The Court noted that the Fifth Amendment does not forbid the taking of property; it just forbids taking property without just compensation. So, as the Court explained in a footnote, it is not possible to say that a violation of the Fifth Amendment has occurred until it is clear that just compensation has been denied to the property owner. 105 S. Ct. at 3121, n. 13. That point cannot be clear, said the Court, until the property owner has used state created procedures for just compensation and been denied that compensation. The Commission had not shown that the Tennessee inverse condemnation procedure was either unavailable or inadequate. Until the bank had attempted to use that procedure, its taking claim was premature.

Williamson County is dispositive under the facts of this case. The Board specifically found that Appellant's proposed subdivision would have a significant adverse impact upon the environment; that a residential subdivision on Appellant's property would render cultivation of agricultural land in the vicinity of Appellant's property unfeasible; that the Appellant had not provided access to the

proposed subdivision by a public street; that Appellant had not provided for sewer service by any governmental entity, and had not undertaken any actions to annex to a sewer service area; that no provision had been made for public water; and that Appellant's proposal to provide sole access to the subdivision by means of a 1300-foot extension of Cowell Boulevard would constitute a danger to the public health. Thus, the Board found that the proposed subdivision was inconsistent with the county's general plan.

The Appellant made no attempt to challenge the fairness of the Board's hearings. The Appellant was required to seek state and county administrative remedies for relief of which it had several routes to take. The Appellant could have redesigned its proposal in order to meet the objection of the Board. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (where failure to obtain a final decision regarding how the developer would be allowed to construct above Grand Central Terminal resulted in a finding of no taking). The county's general plan and its ordinances do not prevent all development and the Appellant was not precluded from submitting a development plan without the deficiencies in the plan and consistent with the general plan. Not having sought approval for another plan, it certainly remains unclear as to whether the county would have denied approval for all uses of the property.

The Appellant sought no variances demonstrating hardship. Failure to seek variances alone is fatal to the ripeness of a taking claim. *Williamson County, supra*, p. 3117; *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 297 (1981). Denial of a variance would have given the Appellant a final determination by the county since denial is based upon full disclosure of the

nature of the Appellant's hardship claims at the fact finding level of a quasi-judicial proceeding.

The Appellant further ignored state avenues for relief which included applications to the county for reassessment of the sewer and drainage assessments,¹ for reduction in taxes assessed against the property,² or for entry into an "agricultural preserve contract" thereby qualifying for special property tax treatment.³

Finally, the trial court supports the finding that the Appellant has mainly permitted and conditionally permitted nonagricultural uses and that Appellant's claim that the portion of Appellant's property at issue now relegates the entire property to agricultural use only is incorrect and conclusory. See Appellees Brief p. 31-32. Thus, the entire evidence of record fails to support the Appellant's allegation that recourse to administrative relief had been exhausted or is futile or that a final decision had been rendered. That Appellant's mandamus action still is pending in the trial court is persuasive that local administrative and judicial remedies have yet to be exhausted as required under *Williamson County* and, further, that this case has frustrated the resolution of those administrative proceedings aforementioned.

No rule determines when a specific property has been taken. *Agins, supra*, at 260-61. The mere assertion of

¹Cal. Sts. & Hy. Code §§5500-5511, 5550-5565 (West 1969 & Supp. 1986); *Furey v. City of Sacramento*, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 844 (1979), cert. den. & app. dismissed, *Webber v. City of Sacramento*, 4444 U.S. 976 (1979).

²Cal. Const. art. XIII, §1, 16 (West Supp. 1986); Cal. Rev. & Tax. Code §§1601-1613 (West 1970 & Supp. 1986).

³Cal. Const. art. XIII, §8 (West Supp. 1986); Cal. Gov't Code §§51200-51298 (West 1983 & Supp. 1986); Cal. Rev. & Tax. Code §§402.1 (West Supp. 1986), 421-430.5 (West 1970 & Supp. 1986).

regulating jurisdiction by a government entity does not constitute a "taking." *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985). Generally, neither a landlord nor a neighbor has a vested right to have existing zoning remain unchanged. 1 Anderson, *American Law of Housing*, § 4.27 (2d ed. 1976); *H.F.H. Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975), cert. denied, 425 U.S. 904 (1976) (owner); *Aquino v. Tobriner*, 298 F.2d 674 (D.C. Cir. 1962) (owner); *Ellentuck v. Klein*, 570 F.2d 414 (2nd Cir. 1978) (neighbor); *Stratford v. State-House, Inc.*, 542 F.Supp. 1008 (E.D. Ky. 1982) (neighbor); *Sachetti v. Blair*, 536 F.Supp. 836 (S.D.N.Y. 1982) (neighbor). Local government regulations involve the adjustment of rights for the public good, and this adjustment often curtails some potential use or economic exploitation of private property. *Andrus v. Alard*, 444 U.S. 51, 65 (1979).

Although a taking may occur where the owner is left with no viable use of his land or where the ordinance does not advance substantially legitimate state interests, *Agins*, *supra* at 260, neither lost profits, nor a diminution of property values is sufficient to establish a taking through the exercise of zoning powers. *Penn Central*, *supra*; *Hadacheck v. Sebastain*, 239 U.S. 394 (1915) (87.5% reduction in value); *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (75% reduction in value). Denial of the highest and best use of a landowner's property does not constitute a "taking." *Penn Central*, *supra* at 125; *Andrus*, *supra* at 66; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962).

Denial of only one development proposal for specific deficiencies that the case at bar presents is not a taking of all uses. The Appellant has not been precluded from developing its property in other commercially viable ways. The

Appellant can sell, maintain possession, and use its property for agricultural or development purposes. Just because a landowner buys property with the vision of using that property for a particular kind of development in the future does not suddenly preclude a local legislature from exercising its local police power to protect its constituents in the surrounding area from congested development or other adverse environmental impacts. These governmental purposes long have been recognized as legitimate even though health, welfare and safety regulations prohibit existing beneficial use of the property.

Therefore, NIMLO submits that no concrete determination exists to base a taking analysis.

II. INVALIDATION OF AN ORDINANCE FOR AN UNCONSTITUTIONAL REGULATORY TAKING IS THE APPROPRIATE REMEDY

The idea that a regulation which goes too far will be recognized as a "taking" originated in Justice Holmes' use of the word "taking" in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); "The general rule at least is that while property may be regulated to a certain extent, if the regulation goes too far, it will be recognized as a taking." Justice Holmes used "taking" not to describe an event requiring payment of just compensation but as a metaphorical shorthand description of a regulation that was invalid and therefore *void ab initio*. See Williams et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984). The issue in *Mahon*, which involved only private litigants, was not whether a Pennsylvania statute prohibiting subsurface mining created a compensable event but whether the Act was valid. Justice Holmes never intended that local regulations overly intrusive of private property be compensable under the Fifth Amendment, and to attach a

literal meaning to Holmes' use of "taking" is to misread *Pennsylvania Coal*. The eminent domain and police powers are separate and distinct powers. Regulations which constitutionally are too restrictive in the sense that they become equivalent to a taking for a public use and are accomplished by the exercise of a separate power of eminent domain are simply invalid and do not constitute a compensable event.

In the event the Court should resolve the "taking" issue which appears before it, NIMLO urges the Court to adopt the concurring opinion by Justice Stevens in *Williamson County, supra*, at p. 3125, which established a framework for the analysis of permanent and temporary "taking" claims. Justice Stevens classified permanent harm into three categories: (1) those that are not permitted even if government is willing to provide compensation; (2) those that are permissible if compensation is paid; and (3) those that are permissible even if no compensation is paid. When a court concludes that a government regulation does not fall within the third category, Justice Stevens would find that the ruling could be expressed either as a finding of invalidity or by characterizing the regulation as a "taking." In such situations

there is nothing in the Constitution that prevents the Government from electing to abandon the permanent harm-causing regulation. The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be cancelled and must always give rise to a right to compensation. *Williamson County, supra* at p. 3125-36.

The harm in the case at bar is not ripe for review because it is not possible to know how severe the harm inflicted is.

Even though the actions of Yolo County and the City of Davis may have inflicted serious harm, this harm should be classified as temporary.

There are two types of temporary harm according to Justice Stevens. Those resulting from a deliberate decision to appropriate property to public use for a limited period of time and those that are a by-product of governmental decision-making. This second category is "fairly characterized as an inevitable cost of doing business in a highly regulated society" and is an "unfortunate but necessary by-product of disputes over the extent of the government's power to inflict permanent harms without paying for them." *Williamson County, supra*, p. 3126. Although statutes authorizing the recovery of litigation costs and attorneys' fees provide a measure of compensation for some temporary harms, in most cases, Justice Stevens concedes, there is no effective remedy for the property owner unless his Constitutional rights have been violated. If the rights of a property owner are harmed

. . . even temporarily — without due process of law, he may have a claim for damages based on the denial of his procedural rights. But if the procedure that has been employed to determine whether a particular regulation 'goes too far' is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm. *supra*, p. 3126.

For Justice Stevens, the requirement of fair procedures that flows from the Due Process Clause of the Fourteenth Amendment is not a command that regulations may never impose any cost upon the citizen "unless the Government's position is completely vindicated." His response to Justice Brennan's "temporary taking" notion, as articulated in

San Diego Gas & Electric v. City of San Diego, 450 U.S. 621 (1981) is:

we must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a 'taking' of private property. *Williamson County, supra*, p. 3127.

Justice Stevens' concurring opinion removes the spectre of governmental liability as an inevitable risk of good faith, procedurally-fair attempts to regulate that a court later decides are not constitutionally sustainable. Today, the financial solvency of most local governments are threatened because of their inadequate tax base and through the policy of the present administration to have local governments carry greater burdens in supporting its citizenry. Even if developers were in need of special protection by the Court, compensation is the wrong kind of help because it will give all developers the coercive threat of compensation against municipalities which must weigh the public benefits against developers' schemes. Should the Court adopt Justice Brennan's dissent in *San Diego Gas & Electric, supra*, then governmental entities will have two choices: either approve developers' plans or pay developers damages.

For these reasons, NIMLO urges the Court to adopt the persuasive analysis of Justice Stevens' concurrence and re-

ject the superficial simplicity of awarding compensation for temporary takings.

III. APPELLANTS' 42 U.S.C. §1983 CLAIM IS INVALID AS THERE WAS NO DEPRIVATION OF A CONSTITUTIONALLY-PROTECTED RIGHT

Section 1983⁴ provides that any person⁵ acting under color of state law who violates certain rights of another may be liable to the party injured. Without a violation of the protected rights, there can be no Section 1983 cause of action.⁶ Appellant argues that its complaint properly alleges a Section 1983 cause of action. Brief for Appellant at 26. However, Appellant can not classify Appellees' actions as violative of Constitutional rights by merely alleging such.⁷ Appellant's allegations must have a basis which provides them with support. To properly state a claim under Section 1983 a plaintiff must factually allege deprivation of a

⁴42 U.S.C. §1983 (1976 & Supp. III 1979) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

⁵A city or municipality is a "person" within the meaning of the act and not immune from Section 1983 claims. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

⁶Two allegations are required to state a cause of action under Section 1983: 1) the plaintiff must allege that some person has deprived him of a federal right and 2) he must allege that the person who has deprived him of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

⁷Under California law, conclusory allegations of law or fact in the complaint are not deemed true. *Pan Pacific Properties, Inc. v. County of Santa Cruz*, 81 Cal. App. 3d 244, 251, 146 Cal. Rptr. 428 (1978).

protected right under color of state law. *Monroe v. Pape*, 365 U.S. 167, 171 (1961) *rev'd* on other grounds, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Since Appellant is claiming the deprivation of a constitutional right, the taking of its property without just compensation, the facts as alleged in its Section 1983 cause of action must state the Constitutional violation. As stated earlier for there to be a taking there must be some final action on the part of the Appellees from which the status of the property owner's rights may be established, *Williamson County, supra*, *San Diego Gas & Electric Co., supra*. The record indicates that there has been a failure to exhaust administrative remedies by the Appellant. Exhaustion of such remedies could create the final action necessary to support a just compensation claim under Section 1983. However, without some final action by the Appellees, this Court can not determine whether a taking has occurred. If a taking cannot be determined here, then a Section 1983 claim cannot be brought.

Appellant attempts to rely on this Court's decision in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) to circumvent this requirement. However, Appellant's reliance on *Patsy* is misplaced as this Court has stated in *Williamson* that *Patsy* stands for the proposition that a Section 1983 plaintiff is not required to resort to remedial procedures designed to review the lawfulness of an otherwise final administrative action. Here, as in *Williamson*, the *Patsy* rationale cannot apply because a conclusive determination of whether Appellant is denied all beneficial use of its property has not yet been made. Without such a determination, a reviewing court can not establish whether a taking has occurred. And again, since a taking cannot be found, a damage claim under Section 1983 cannot be brought.

This Court's rulings in *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 104 S.Ct. 3194 (1984) provide additional hurdles to Appellant's attempts to bring a Section 1983 claim. In *Parratt*, it was found there was no federal claim enforceable through Section 1983 for the deprivation of a property interest where the deprivation resulted from random, unauthorized and negligent conduct by a state official and where state law provides for an adequate post-deprivation remedy. 451 U.S. at 542-43. *Hudson* expanded *Parratt* to include claims of intentional deprivations of property. The California Court of Appeals relied on *Parratt* in reaching the decision at issue here. J.A. at 135. Other lower courts also have used *Parratt* and *Hudson* to determine that the Constitution requires the payment of just compensation but does not require that it be provided by a federal court judgment. *Collier v. City of Springdale*, 733, F.2d 1311 (8th Cir.) cert. denied, ____ U.S. ____, 105 S.Ct. 186 (1984); *Cuzzuppe v. Paparone Realty Co.*, 596 F.Supp. 988 (D.N.J. 1984); *Nika Corp. v. City of Kansas City*, 582 F.Supp. 343 (W.D. Mo. 1983); and *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982). As a result, the availability of a means to obtain adequate compensation from the state prevents a landowner from claiming a denial of his constitutional rights to just compensation. The adequate compensation mechanism here, is the Appellant's right to bring an action declaring the regulation invalid. See, *Agins, supra*.

It is clear there has not been an actual physical taking of Appellant's property. Equally clear is that without a final determination by the County Board on what use is permitted on Appellant's property, there can be no regulatory taking, and consequently, no Section 1983 claim.

A. APPELLANT'S USE OF SECTION 1983 IS IMPROPER AS THE STATUTE WAS NOT INTENDED TO BE USED TO ENFORCE INVERSE CONDEMNATION LAWS

This case presents the Court with an opportunity to limit the use of Section 1983 in actions against municipalities to the protection of equal rights guarantees found in the Constitution and certain federal laws. Since this Court's decisions in *Owen v. City of Independence*, 445 U.S. 622 (1980) and *Maine v. Thiboutot*, 448 U.S. 1 (1980), which removed a municipality's good faith defense and expanded Section 1983 litigation to encompass all federal laws, the nation's cities have been hit with an explosion of Section 1983 litigation.⁸ Such an effect could not have been Congress' intent or purpose when enacting Section 1 of the Ku Klux Klan Act of April 20, 1871. 17 Stat. 13, now codified at 42 U.S.C. §1983. See *Thiboutot*, *supra* at 2508-2521 (Powell dissent), *see also Freilich and Carlisle*, SECTION 1983: SWORD AND SHIELD (1983) and Lansford, *Comment: Municipal Liability Under the Ku Klux Klan Act of 1871 — An Historical Perspective*, SECTION 1983: SWORD AND SHIELD at 23. The law which was passed to curtail the outrages perpetrated by the Klan in the Reconstruction era South, is now routinely used by anyone who disagrees with a decision of a local government. *Owen* and *Thiboutot* changed the balance between the protection of legitimate civil rights and excessive judicial interference into the operations of state and local governments. Since *Owen* and *Thiboutot* were decided, a majority of cases before the federal courts seeking to enforce Section 1983 to particular causes of action have had little relationship to the enforcement of traditional equal

⁸A recent NIMLO survey indicates that billions of dollars have been brought since 1980 in Section 1983 claims against the United States' 82,000 local government units.

rights. This imbalance in favor of such Section 1983 suits exposes now defenseless local governments to absurdly costly liability.

Section 1983 is not well suited to litigate land use disputes. Use of the Section has resulted in a balancing of the individual property owner's rights with the right of society to control property for the common good. Emphasizing individual rights at the expense of municipalities is using Section 1983 to thwart society's attempts to deal with complex social issues.

Section 1983 has been the tool by which the powers of local governments have steadily been cut back, in direct violation of the principles of Federalism. Legal authorities have recognized the importance of Federalism in this country's legal infrastructure⁹ By leaving municipalities open to unlimited liability, a result accurately predicted by the dissents in *Owen*, 445 U.S. at 665, and *Thiboutot*, 448 U.S. at 22, the abilities of local governments to plan their affairs continues to be severely curtailed.

Recognition of the burdens imposed upon municipal taxpayers and the court dockets by the unintended use of Section 1983, as a catchall basis for federal jurisdiction and remedies whenever a party is unhappy with the actions of local governments or their employees, should be a prime consideration in interpreting the statute. Problems of local governments under Section 1983 did not arise out of a legislative decision to impose such broad liability upon these governments, but out of a 1978 judicial interpretation of legislation adopted over a century earlier. *Monell*, *supra*. Use of Section 1983 in the land use arena creates an imbalance which hurts local governments and

⁹See, comments of Solicitor General Lee and Attorney General Meese in *The Municipal Attorney*, Vol. 26, No. 3 at 3-4 (1985).

the local taxpayers. Municipalities find a greater percentage of their budgets are devoted to litigating such claims, which further strains the finances of local governments. This Court has been sensitive to the mounting costs local governments face as a result of federal and judicial activity. *See National League of Cities v. Usery*, 426 U.S. 833 (1976) *rev'd* on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1003 (1985). Such concern should again be demonstrated when Section 1983 is at issue before this Court.

CONCLUSION

Under the Fifth Amendment since no taking has been shown to occur in this case, there can be no constitutional deprivation sufficient for relief under Section 1983. The mere allegation of a constitutional violation does not create a violation absent facts to support the allegation. Not only is Appellant's Section 1983 claim not proper here, but Section 1983 is generally not well suited for litigating land use decisions.

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AMICUS CURIAE

BRIEF

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Supreme Court, U.S.

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IN THE
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OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES,
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Appellees.

On Appeal from the Court of Appeal of California

BRIEF OF
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U.S. CONFERENCE OF MAYORS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
AND NATIONAL GOVERNORS' ASSOCIATION;
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QUESTION PRESENTED

Whether a landowner, whose intensive residential development proposal has been rejected by a county as inconsistent with its land use regulations, can, in an action seeking to overturn the county's decision, state a valid claim for just compensation under the Fifth Amendment for interim deprivation of profit expectations from the use of the property.

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BRIEF OF
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JOINED BY THE AMERICAN PLANNING ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States, and an organization of city and regional planners and officials concerned with planning and orderly urban development. *Amici* and their members, therefore, have a vital interest in the legal

issues that affect the powers and responsibilities of state and local government in the context of land use.

This case is of great consequence to state and local governments and the APA because it threatens their ability to regulate effectively in guiding urban, suburban, and rural development. The principal question is whether, and under what circumstances, land use regulation can be equated with a governmental exercise of the power of eminent domain, so as to give rise to a claim for "just compensation" under the Fifth Amendment. This question goes to the heart of government's police power authority to structure the orderly development of land in the public interest. A decision creating governmental liability for any impairment of the value of private property by regulation could paralyze efforts undertaken in the interest of the public health, safety, and welfare, by making it prohibitively expensive to provide for development in stages that will ensure the continued adequacy of water supplies, sewage systems, roads, parks, and police and fire protection for burgeoning communities.

Amici also note that to expand the constitutional restrictions on state and local governments engaged in land use regulation would swamp the state courts, and greatly add to the federal courts' caseload under 42 U.S.C. 1983, with lawsuits by landowners seeking to recoup real or speculative losses. A similar expansion of lawsuits can be expected outside the field of land use planning in other areas of state and local government regulation having arguably adverse effects on personal property or private businesses.

Because of *amici's* long familiarity with land use regulation and its objectives and a deep concern over the outcome of this case, *amici* submit this brief to assist the Court in its resolution of the issues.

STATEMENT OF THE CASE

Amici adopt the appellees' statement of the case.

SUMMARY OF ARGUMENT

In this case, appellant asks this Court to rule that it is entitled to just compensation for a "taking" of its right to develop its property as it pleases through the imposition of land use regulation that it terms invalid. Appellant's claim rests upon a fundamental misconception of the nature of the property interests that are protected by the Fifth Amendment. The language of the Amendment, its historical background, and its consistent interpretation by this Court recognize the distinction between ownership interests in land, which cannot be infringed without the payment of just compensation, and the use of land, which can be restricted by reasonable governmental regulation in the public interest without entitling the owner to compensation. Land use regulation has been a recognized function of the police power in this country since colonial times, when it was a part of the common-law tradition imported from England; it should not be converted to a constitutional deprivation. Any economic injury resulting from such regulation is simply one of the accepted burdens of living in a civilized society.

The Court has consistently acknowledged the difference between physical occupation, invasion or destruction of property, on the one hand, and police power regulation on the other. In judging the validity of zoning regulations, the Court has looked only to determine whether they are reasonable, nonarbitrary, and rationally related to legitimate state objectives. If they are not, then the remedy is to set them aside. Until quite recently, it has not even been suggested that setting aside such a regulation gives rise to a claim for compensation. Regulation simply cannot be equated with a taking such as occurs when land is occupied or invaded.

Appellant's claim to compensation rests upon disappointment of its "investment-backed expectations." If this claim is sustained in the context of zoning, state and local governments would be severely inhibited in regulating to ensure orderly residential development in the

interest of public health and safety. In addition, the courts would soon be faced with other just compensation claims arising from an infinite variety and number of government regulations.

Amici submit that this is not one of the few extraordinary cases of confiscatory regulation that may be likened to physical occupation of property, but rather an instance of the common type of zoning regulation that is valid because it is reasonable. *Amici* further submit that the temporary imposition of a zoning regulation, even if later withdrawn, is merely "an inevitable cost of doing business in a highly regulated society." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S.Ct. 3108, 3127 (1985) (Stevens, J., concurring).

ARGUMENT

I. THE TEXT OF THE FIFTH AMENDMENT, ITS PURPOSE, ITS HISTORICAL BACKGROUND, AND ITS INTERPRETATION BY THIS COURT CONFIRM THAT ORDINARY LAND USE REGULATION DOES NOT GIVE RISE TO A CLAIM FOR JUST COMPENSATION.

The central issue in this case is whether, and under what circumstances, land use regulation can be equated with the exercise of the power of eminent domain, so as to give rise to a claim for just compensation under the Fifth Amendment.¹ Because the Fifth Amendment confers no right to be free from all regulation of land,²

¹ The Fifth Amendment is made applicable to the states by the Fourteenth Amendment. *Chicago B. & Q. Ry. Co. v. Chicago*, 166 U.S. 226, 241 (1897); see *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 623 n.1 (1981).

² The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

the examination of the takings issue must begin with an analysis of the Fifth Amendment itself, its historical context, its purpose, and its interpretation by this Court.

The text of the Amendment itself establishes that its purpose was not to provide protection against diminution of property values incident to otherwise valid government regulation. Rather, the aim of the drafters of the Fifth Amendment was to prevent harsh, arbitrary, and capricious action by the federal government depriving people of life, liberty, or property.

The concepts of land ownership in the United States are based in large part on those prevailing in England at the time that the colonies were settled.³ Long before the adoption of the Constitution, land use regulation was an accepted function of government in England. For example, in 1580, Queen Elizabeth I issued a proclamation forbidding the construction of any housing within three miles of the City of London, preventing owners of vacant land from developing it.⁴ An Act of Parliament in 1588 prohibited erecting more than one building on a plot of four acres.⁵ Further proclamations regulated the conversion of homes to multiple family dwellings,⁶ forbade overcrowding of dwellings in the City, and specified the mate-

against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added.) In this brief, the italicized language is interchangeably referred to as the Just Compensation Clause or the Takings Clause.

³ See generally Note, *The Origins and Original Significance of the Just Compensation Clause*, 94 Yale L.J. 694 (1985); F. Bosselman, D. Callies, and J. Banta, *The Taking Issue* (1973); Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971) (Sax II); Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964) (Sax I).

⁴ S. E. Rasmussen, *London, The Unique City* 67-68 (1937).

⁵ 31 Eliz. I, C.7 (6 Stat. Large 409, *et seq.*)

⁶ 35 Eliz. I, C.6; see Bosselman, *supra* note 3, at 66 n.43.

rials to be used in construction.⁷ Following the Great Fire of London in 1666, Parliament enacted a law regulating housing in London including sewerage, methods of construction, and placement of the buildings.⁸ The Act even required rebuilding within three years on threat of sale by the Mayor and Council of London.⁹

This concept of regulation of real property for public benefit came to this country with the first colonists. Even though there was no shortage of land, regulation was believed necessary. Virginia and New York, for example, passed laws requiring the growing of certain crops.¹⁰ Local governments also perceived the need for regulation. Rapidly growing towns, like Philadelphia and Boston, regulated the building materials to be used,¹¹ and confined the location of certain noxious uses or prohibited them altogether.¹² Although colonial governments generally purchased land that was needed for public use,¹³ they also used their compulsory powers to expropriate land.¹⁴

⁷ M. Harrison, *London Growing, The Development of a Metropolis* 130 (1965).

⁸ 19 Car. II, C.3 (8 Stat. Large 233-51).

⁹ *Ibid.*

¹⁰ Virginia, 1 H. 166; 1 H. 219; 1H. 420; New York, Colonial Laws (March 26, 1653).

¹¹ Mass. Laws (1672) 269; 2 Pa. Stat. 311, Ch. 59.

¹² Bosselman, *supra* note 3, at 83-84.

¹³ 1 Laws 269, Ch. 18 (New York act authorizing New York City to assess value of land and purchase it); 4 Pa. Stat. 150, ch. 310 (act providing for purchase of land in each county for courthouse).

¹⁴ Although paying compensation for developed land was the usual rule, in an emergency other rules prevailed. See *Emmons v. Brewer*, reported in *The Legal Papers of John Adams*, No. 33, at 9 *et seq.*; *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. S.Ct. 1788); Stoeck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 581-82 (1972) (payment only for improved land). Apparently no reported colonial or early American decision holds that compensation is required for a taking. *Id.* at 553, 575, 579; *Note, supra* note 3, at 695.

The ratification process of the Fifth Amendment as part of the Bill of Rights confirms that fears about land regulation played no part in prompting the Amendment's protection.¹⁵ The initial draft of the Amendment, based on the Virginia Declaration of Rights, contained no Just Compensation Clause.¹⁶ That clause was apparently added by Madison, although there is little record of debate on the Clause either in the Congress or in the state legislatures before ratification.¹⁷ Although the exact reason of the Framers for adoption of the Just Compensation Clause is unclear, a commentator in 1803 declared that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever."¹⁸

Modern commentators agree that there is no evidence the Just Compensation Clause was intended to apply to government authority to regulate the use of land for the common good. The focus of the Clause was on direct, physical takings of property.¹⁹

¹⁵ Congress proposed the Bill of Rights for ratification after the adoption of the Constitution to address fears of possible abuse of the powers granted the federal government by the Constitution. 14 *The Papers of Thomas Jefferson* 659 (J. Boyd ed. 1958).

¹⁶ The prohibition against government seizure of land found both in state and federal Bills of Rights no doubt derives from the Magna Carta. The Great Charter prohibited depriving a freeman of his freehold "unless by the lawful judgment of his peers and by the law of the land." No mention was made of paying compensation for the taking.

¹⁷ James Madison, the author of the Bill of Rights, stated in his essay, *Property*, that "no land or merchandise shall be taken directly even for public use without indemnification to the owners." 14 J. Madison, *The Papers of James Madison* 267 (R. Rutland ed. 1977).

¹⁸ St. George Tucker, *Tucker's Blackstone, Commentaries* 305-06 (appendix) (1803). See, e.g., *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. S.Ct. 1788).

¹⁹ Sax I, *supra* note 3, at 58-60; Bosselman, *supra* note 3, at 82-104. Thus, a physical invasion has been termed "the quintessential

Thus, it is not surprising that, in the nearly 200 years since the ratification of the Bill of Rights, ownership of land in the United States has never been thought to confer an absolute right to do whatever the owner wanted to do with the land.²⁰ In the 19th and early 20th centuries, land use regulation remained largely unquestioned. This Court's Just Compensation Clause cases concerned actual seizures of property,²¹ physical invasion,²² or permanent encroachment.²³ Police power regulation, even if it amounted to complete destruction of the value of the property, was not held to require compensation. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887).²⁴

deprivation of property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 419, 430 n.7 (1978) (citing 1 W. Blackstone, *Commentaries* *139).

²⁰ See generally, Note, *supra* note 3; Bosselman, *supra* note 3; Sax II, *supra* note 3; Sax I, *supra* note 3.

²¹ See, e.g., *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598 (1908).

²² See, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871).

²³ See, e.g., *United States v. Lynock*, 188 U.S. 445 (1903).

²⁴ *Mugler* upheld a prohibition, with limited exceptions, of the manufacture and sale of intoxicating liquor, and the criminal prosecution of a beer brewer who had begun his business before the prohibition statute was enacted. In this case, commonly thought to be the beginning of modern compensation law (Sax II, *supra* note 3, at 149), the Court stated (123 U.S. at 664):

[I]t is contended that, . . . although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happened to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the states intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.

In this century, as land use regulation has become more extensive to meet the needs of a society far more populous, complicated, and diverse than in 1789, the Court has been asked to apply the Just Compensation Clause to circumstances very different from those contemplated by the drafters of the Bill of Rights. For the first time, the idea emerged that government actions affecting property, which were termed "regulation," could constitute a taking. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court stated that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Even as it invalidated the regulation, however, the Court pointed out that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

Thus it is not surprising that subsequent cases considering claims that certain land use regulation "goes too far" have not found much force in the takings theory of *Pennsylvania Coal*.²⁵ Although frequently repeating *Pennsylvania Coal*'s premise that governmental land-use regulation may under extreme circumstances amount to a 'taking' of the affected property" (*United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985)),

²⁵ In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court held that zoning regulations were invalid as applied. The trial court dismissed the application for rezoning, in spite of the findings of the master hearing the case that no practical use could be made of the land within the applicable zoning and that the zoning did not promote the health, safety, convenience, or general welfare of the nearby residents. This Court, although it found no reason why the rezoning should not be made, stated that "[n]evertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question." *Id.* at 188. Based on the master's findings, however, the Court held that the zoning was invalid because it exceeded the City's zoning authority. The Court did not find a "taking" and did not award compensation.

the Court has ultimately rejected all takings claims arising from factually supported land use regulation.²⁶

Recently, the validity of residential zoning regulations has troubled the Court.²⁷ In other contexts, however, the takings analysis has been straightforward, and fully reflects the origins of the Just Compensation Clause. The Court recently reaffirmed "the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). *Loretto* held that the physical installation of television cables on property was compensable as a taking because it was a physical occupation authorized by government. *Id.* at 426, 434-35.²⁸ The Court specifically rejected the sug-

²⁶ *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also *Northern Transp. Co. v. Chicago*, 99 U.S. 635 (1879). More important, as we discuss in Part II, *Pennsylvania Coal* was not a compensation case; it found a land use regulation invalid because of the property and contract rights that it destroyed.

²⁷ *Williamson Cty. Reg. Pl. Comm'n v. Hamilton Bank*, 105 S.Ct. 3108 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²⁸ The Court explained that

[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking. As *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

458 U.S. at 435 n.12. The Court also noted that physical occupation "is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on

gestion that the application of the physical occupation rule would have "dire consequences" for the government's power to regulate, noting that "[t]his Court has consistently affirmed that States have broad power to regulate [real property] without paying compensation for all economic injuries that such regulation entails." *Id.* at 440 (citing six cases).

In short, nothing in the history of the Just Compensation Clause, nor its subsequent interpretation by the Court, supports the current attempts of land developers, including appellant, to seek compensation for the economic injury that they attribute to the ordinary police power regulation of land.

II. PHYSICAL OCCUPATION AND SOME INVASIONS OF LAND REQUIRE COMPENSATION; LAND USE REGULATION ALMOST INVARIABLY DOES NOT.

Given the clarity with which *Loretto* sets out the three main categories of governmental interference with the use and enjoyment of private property, it is somewhat mystifying that the search for the contours of the concept of "takings" as applied to land use regulation has recently become so confused. With *Loretto* as a guide, and against the backdrop of the history and theory explained in Part I of this brief, it becomes quite easy to identify the property interests that land use planning and regulation do not implicate and thus what standards do not apply in determining its validity. It is then quite easy to identify the interests that it *does* implicate and thus the standards that *do* apply.

A. Physical Occupation Or Invasion Of Land By Government, Whether Permanent Or Temporary, Has Historically Been Differentiated From Land Use Regulation.

As noted above, *Loretto* delineated "the distinction between a permanent physical occupation, a physical in-

the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* at 436.

vasion short of an occupation, and a regulation that merely restricts the use of property." 458 U.S. at 430. Land use regulation, although it obviously affects real property, cannot be likened to a physical occupation. When the government occupies and acquires property, whether fee title, easement, or servitude, the government increases its store of "proprietary interests."²⁹ For the occupation of property, the Court has repeatedly held that the government must pay.³⁰ Even if a physical occupation is only temporary, the government still must pay for the use of the property so long as it is occupied.³¹ But the Court also has repeatedly distinguished physical occupation, permanent or temporary, from regulation. *Loretto*, *id.* at 430.

Nor can land use regulation be likened to a physical invasion of property. Physical invasion, as distinguished from physical occupation, is not absolutely compensable, because it is less likely that the property is "taken" by a physical invasion. *Loretto*, *id.* at 432.³² "[A] distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision." *Bedford v. United States*, 192 U.S. 217 (1904). If physical invasion is continuous and highly intrusive, thus substantially impairing the

²⁹ Stoebe, *supra* note 14, at 570.

³⁰ See, e.g., *Loretto*; *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Lynah*, 188 U.S. 445 (1903); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871).

³¹ *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors*, 323 U.S. 373 (1945).

³² There is also a line of taking cases concerning destruction of property. Again, the protection of private property from destruction for the public good is not absolute, and just compensation is not always required. See *Miller v. Schoene*, 276 U.S. 272 (1928) (ornamental cedar trees destroyed to prevent spread of disease to apple orchard). See also *United States v. Willow River Power Co.*, 324 U.S. 499 (1945). More recently, in *Armstrong v. United States*,

owner's rights in the property, it may constitute a taking³³; if it is unobtrusive and temporary, it will not.³⁴ The Court has applied a balancing test that generally measures "the character of the governmental action [that is, the type of interference with the property], its economic impact, and its interference with reasonable investment-backed-expectations." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); 447 U.S. at 83; see *Kaiser Aetna*, 444 U.S. at 175.

B. Ordinary Land Use Regulation That Merely Restricts The Use Of Property Does Not Constitute A Taking Requiring Just Compensation.

Finally, there is land use regulation "that merely restricts the use of property." *Loretto*, 458 U.S. at 430. Of all types of government action that affect real property, land use regulation is subject to the fewest restrictions and is the least likely to constitute a taking.³⁵ This

364 U.S. 40 (1960), the Court, although noting that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," found that materialmen's liens against property transferred to the United States were taken when the United States refused to pay them and could not be sued because of sovereign immunity.

³³ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Causby*, 328 U.S. 256 (1946);

³⁴ *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980).

³⁵ The federal government's brief in this case fails to differentiate among the various types of government action that affect property. There is no dispute about the federal government's statement (Br. 19) that "the government is required by the Fifth Amendment to pay compensation not only as a condition to its acquisition of fee title or its functional equivalent, but also as a condition to the taking of a lesser interest—such as an appropriation of a leasehold or other interest that is not permanent in duration," citing *United States v. General Motors Corp.*, 323 U.S. 373 (1945), and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). The brief, however, does not explain how zoning regulations fit this principle. A "taking" does not occur in the abstract, and a "temporary taking"

Court has repeatedly held that reasonable land use regulations do not require just compensation.³⁶

In fact, *Pennsylvania Coal*, the source of the suggestion that land use regulation can amount to a taking, is cited as a case of regulation that "goes too far," but it was actually a "taking" by destruction of a property interest in mining below the surface of the land. The Court noted that the statute, which prohibited mining "in places where the right to mine such coal has been reserved" (*id.* at 414), "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding on the [landowner]." *Ibid.* The suit, moreover, was brought by the surface landowner for an injunction to prevent further mining by the coal company. Compensation for a "taking" was not an issue because the coal company did not sue. More important, because the state was not a party to the case, compensation could not have been awarded. Thus, the reference

does not occur simply because some government action is in effect for a period of time. Rather, a taking occurs only upon the government's "acquisition . . . of a[n] interest in property." The federal government fails to identify the "interest" that the government acquires through zoning or of which it deprives a property owner.

The federal government also oversimplifies this case when it suggests that whether the temporary application of a regulatory restriction amounts to a taking should be determined by the standards applied to permanent restrictions, "albeit that they must be applied with due regard for circumstances that are unique to the interim or temporary nature of the deprivation." *Br.* 28. The whole question is whether there is a deprivation by the temporary application of a regulatory measure.

³⁶ *Hodel v. Va. Surf. Min. & Recl. Ass'n*, 452 U.S. 264 (1981) (steep slope mining); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (historic landmark); *City of Eastlake v. Forest City Enter.*, 426 U.S. 668 (1976) (referendum on zoning); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning for one-family dwelling); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (zoning); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (zoning).

to "taking" in that case merely denoted an illegal exercise of police power because of the destruction of property rights, not a requirement that the state pay just compensation. To derive the concept of compensation for a regulatory "taking" from *Pennsylvania Coal* is unfounded.³⁷

With *Pennsylvania Coal* properly put to one side, attention can be turned to the standards that the Court has consistently applied in the zoning context.³⁸ In *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), the Court held that zoning will not be unconstitutional unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." More recently, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court held that land use regulation, as economic and social legislation, need

³⁷ Justice Brennan, the author of the opinion that has lent credibility to the theory of regulatory taking by zoning (*San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 636, 646 (1981) (dissenting opinion)), also authored this Court's opinion in *Andrus v. Allard*, 444 U.S. 51 (1979), which held that regulations prohibiting commercial transactions in parts of birds legally killed before the birds came under federal protection did not constitute a taking. Justice Brennan's opinion in *Allard* cites Justice Brandeis' dissent in *Pennsylvania Coal*, 260 U.S. at 422, for the point that the regulations were "a burden borne to secure 'the advantage of living and doing business in a civilized community.'" 444 U.S. at 67.

³⁸ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), is not properly put in this line of zoning cases because the issue there, according to the majority opinion, was the City's power to "place restrictions in addition to those imposed by the applicable zoning ordinances." *Id.* at 107 (emphasis added). The dissent agreed that it was not a mere zoning case because the City did not "dispute that valuable property rights have been destroyed." *Id.* at 142. Presumably it was because of these property rights that the majority cited *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), and assessed the impact on investment-banked expectations. Interestingly, the *Penn Central* majority held that even the additional restriction met this test; and the test is stricter than that usually applied to zoning.

only be "reasonable, not arbitrary" and rationally related to a permissible state objective.³⁰ Except for *Nectow*, the Court has never invalidated a zoning regulation⁴⁰; and the invalidity in *Nectow* was not described as a taking.⁴¹

Zoning, as a regulatory measure, has historically been allowed as good faith regulation of land in the public interest without the requirement of payment of just compensation. This type of government action affecting property—mere regulation—has always been judged more leniently than physical invasion by government (and is at the far end of the spectrum from the absolute requirement of compensation for physical occupation). Thus, although it is likely true that some regulation some time could amount to a taking,⁴² the test for compensability of physical invasion of property, which balances "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" (*PruneYard*, 447 U.S. at 83; see *Kaiser Aetna*, 444 U.S. at 175), is inapplicable. Rather,

³⁰ Mere economic impact is not enough to invalidate such regulation. The Court's opinion notes that "it is obvious that the scale of rental values rides on what we decide today." 416 U.S. at 9.

⁴⁰ Freilich, *Solving the Taking Equation: Making the Whole Equal The Sum of Its Parts*, 15 Urb. L. 447, 454 (1983). See cases cited n.36, *supra*. In fact, the Court did not even hear a zoning case after *Nectow* until *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). See Williams, Smith, Siemon, Mandelker, Babcock, *The White River Junction Manifesto*, 9 Ver. L. Rev. 193 (1984).

⁴¹ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), see note 25, *supra*. *Nectow* stands only for the proposition that the Court will set zoning aside to enforce the conclusion of a finder of fact that zoning is in error. The plaintiff neither sought nor was awarded compensation. The result is therefore perfectly consistent with the theory that *amici* propose, that is, that zoning should be reviewed as regulation, and if unauthorized, set aside, but the error does not give rise to a claim for compensation.

⁴² *Cr. San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 646-60 (1981) (Brennan, J., dissenting).

a "taking" by zoning is measured by the test applied to social and economic legislation, which merely requires reasonable, nonarbitrary regulation rationally related to legitimate state objectives. *Belle Terre*, 416 U.S. at 8.

Essentially, the difference between the two tests lies in the extent to which government must take account of the adverse effects of its action upon economic interests. Whether just compensation must be provided for such adverse effects depends upon the "rights" affected by the regulation. The characterization of the rights, in turn, derives from the historical foundations of the Just Compensation Clause, as well as some very practical considerations.

To propose that land use regulation may never interfere with "investment-backed expectations" is not consistent with the common law origins of the Just Compensation Clause. The Court has been extremely reluctant to find a compensable taking of real property except in circumstances that involve the abrogation of rights recognized at common law. Thus, the Court has consistently recognized a landowner's absolute right to compensation for physical occupations. "Early commentators viewed a physical occupation of real property as the quintessential deprivation of property." *Loretto*, 458 U.S. at 430 n.7. The concept that property, if taken, must be paid for, is no doubt traceable to the ancient idea that "a man's home is his castle," from which he had an absolute right to exclude anyone. The right to exclude others from one's property "is one of the essential sticks in the bundle of property rights." *Kaiser Aetna*, 444 U.S. at 179-80. Therefore, trespass was early recognized as both a tort and a crime. For centuries, however, the common law recognized no equivalent right to be free from nontrespassory injuries. It is therefore not surprising that "[a]t one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur only through physical encroachment and occupation. The

modern [cases] . . . sometimes do hold nontrespasory injuries compensable."⁴³

A right to be free from all regulation of the use of land, however, simply does not exist. It did not exist at common law, and it has never developed since. Such regulation is an exercise of the police power, not the power of eminent domain. Through regulation, the government acquires no possessory or legal rights in the property; it merely regulates the use of property to prohibit injury to the public interest.

In judging the validity of zoning regulations, it is important to bear in mind that any "investment-backed expectations" are not founded on any absolute right to determine the particular uses of the property. In fact, given the pervasiveness and extent of modern zoning regulations, any expectation of uninhibited rights to use property must be minimal indeed. Moreover, zoning reflects and protects an entirely distinct kind of investment-backed expectations: the orderly development of property to further the common good. Justice Marshall, even in dissent in *Village of Belle Terre v. Boraas* (416 U.S. at 13), wrote that "zoning . . . may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."

Increasingly, in our society, a landowner cannot develop the land without affecting other property owners. The arguments presented in the residential subdivision development cases, however, generally fail to take account sufficiently of the rights of nearby residents to be free from the "spillover effects"⁴⁴ of the development. Through zoning, the government allocates resources and resolves claims of competing rights. The result may not

⁴⁴ See generally Sax II, *supra* note 3.

⁴³ Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967).

be the best for a particular individual; but that is neither the goal nor the applicable constitutional standard.⁴⁵ It is a gross misconception of land use in modern society to argue that a landowner's right to develop property for profit must be constitutionally protected at the expense of the community as a whole. Government has a responsibility to protect the community; and thus when it does so through land use regulations, it invokes the police power. The evaluation of such regulations should not be forced into concepts designed to respect one landowner's right to occupy or protect his property.⁴⁶

The investment-backed expectations of a land developer are, of course, relevant to the validity of land use regulation. Police power regulations must not be unreasonable. But land use regulation is an exercise of the police power and therefore is to be judged by the same standards as other police power regulations. Although land use regulation "looks" different because it concerns real property, and therefore appears to implicate a stricter takings analysis, the appearance is deceiving. Use of property at the land owner's absolute discretion is not protected in the same way or to the same extent as possession of property, because a landowner's right to develop its property is constitutionally subject to substantial restrictions. A landowner's absolute right to retain property (as against physical occupation) and even the landowner's

⁴⁵ See *Berman v. Parker*, 348 U.S. 26, 33 (1954) (citations omitted): "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

⁴⁶ In the physical occupation or invasion cases, or the destruction of property cases, it is readily apparent that the government acts in its own interest to the detriment of individual property interests. Through land use regulation, on the other hand, the government acquires nothing for itself, but acts to mediate among competing private use and to limit one or the other if necessary.

conditional right to compensation for invasions or destructions, are not implicated by regulation.⁴⁷ In the context of land use regulation, the concept of "taking" may be useful as a shorthand for the conclusion that regulation has intruded too far on protected rights. The concept is not applicable in its implication that the remedy is compensation rather than invalidation.⁴⁸

C. Practical Considerations Support This Choice Of The Legal Standard.

Finally, if the Court were to hold that a diminution of "investment-backed expectations" through land use regulation can give rise to a claim for compensation, it would soon be plagued with claims based on the impairment of those expectations by other government actions. For ex-

⁴⁷ The Court has considered whether regulation can constitute a taking in contexts other than land use regulation. *E.g.*, *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (emphasis deleted) (rejecting takings claim because "government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. . . . The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'"). Such cases clearly indicate that the concept of "taking" as applied to land use regulation is no different from the analysis applied to other kinds of economic regulation, and is unlike the question whether real property has been occupied or invaded, or other actual property interests have been destroyed.

⁴⁸ Professor Freilich states that perhaps the most important difference between the power of eminent domain and police power is the relief available for violations: "Eminent domain 'takings' are to be given just compensation because they are a valid exercise of a sovereign power. Excessive police power regulation, on the other hand, without the authority and consent to compensate is *ultra vires* sovereign power and challenged on the basis of its validity." Freilich, *supra* note 40, at 460-61. The federal government has previously appeared to recognize the difference between takings and excessive regulation. Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Williamson Cty. Reg. Pl. Comm'n v. Hamilton Bank*, No. 84-4.

ample, a municipal decision to consolidate two public schools may reduce the value of residential property in the neighborhood where a school is closed. Or, were Congress to amend the tax laws to preclude tax deduction for interest paid on a mortgage on a second home, as is sometimes discussed, it would reduce the investment-backed expectations of developers in resort areas.

Moreover, if the claim that a property owner is constitutionally entitled to a maximum return on his investment in land is upheld, it will soon arise in contexts other than land development. People invest in numerous things other than land, and government regularly takes action that reduces their investment-backed expectations. The owner of no other kind of investment property is thought to be constitutionally entitled to protection against diminished investments, much less a maximum return on the investment. For example, an environmental regulation may require a corporation to acquire new equipment that is expensive to purchase, maintain, and operate, with a resulting reduction in profitability. But it has never been suggested that the stockholders could then claim a compensable "taking," through the regulation, of part of the value of their ownership in the company.

The fact that these kinds of decisions and regulations have never been regarded as compensable takings shows that the effect on investment backed expectations should not be the criterion of overriding concern in the context of land use regulation. Moreover, although the precise contexts of other new liabilities may be unknown, the prospect that there will be new takings claims is far less speculative than the picture of wanton destruction of land values through irresponsible municipal regulation.

Amici do not contend that the rare cases of excessive zoning cannot be called a taking. Our quarrel is with neither the terminology nor the suggestion that some land use regulations some time may amount to a taking.

Nor do we contend that investment-backed expectations are irrelevant. We do submit that the standard by which a taking through regulation is measured in those rare cases is not that applied to physical invasion of property through government action; rather, it is the broad standard of the police power. This conclusion is compelled by common law notions of property; the historical derivation of the Fifth Amendment; and the practical distinctions between the effect of zoning and other government action affecting property on the landowner's protected interests.

III. THE IMPOSITION OF ORDINARY ZONING REGULATIONS DOES NOT CONSTITUTE A TAKING FOR WHICH JUST COMPENSATION MUST BE PAID.

The issue of "temporary taking" by land use regulation received its first full treatment in this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In circumstances similar to the present case, the Court held that, because the zoning ordinances under review advanced legitimate governmental goals, appellants "share[d] with other owners the benefits and burdens of the city's exercise of its police power." *Id.* at 262. Appellants were not denied "the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments" because the ordinance did not "extinguish a fundamental attribute of ownership." *Id.* at 262-63. *Agins* involved a general challenge to a zoning ordinance; appellants had not submitted a specific proposal to the relevant authorities. Thus, the Court did not reach the question whether a state may limit the remedies available to a landowner claiming regulatory diminution of the value of its rights without just compensation.⁴⁹

⁴⁹ *Agins* was quickly followed by *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981), which involved a land use regulation imposed after an abortive condemnation effort. The fact that the regulation precluded any use whatsoever of the property moved Justice Brennan, in dissent, to reject the proposition that police power restrictions could never be recognized as a Fifth Amend-

Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S.Ct. 3108 (1985), is the Court's most recent attempt to grapple with the issue of whether residential land use regulation that may not be permanent can amount to a taking. The majority did not decide this question; the Court overturned the award of damages granted the bank by the court below, concluding that the Planning Commission's action was not final because the bank had failed to apply for variances or to invoke state procedures for seeking compensation.⁵⁰

Concurring in the judgment, Justice Stevens agreed that the landowner's failure to exhaust state remedies made it impossible to determine whether just compensation was required. But he also set forth an analysis of land use restrictions which reflects the discussion in Part II of this brief and can be used to resolve the difficult issues in this case.

Justice Stevens correctly noted that "[z]oning restrictions are a species of governmental regulation that may

ment taking. *Amici* do not advance the proposition rejected by Justice Brennan. We would note that, in any event, the facts of *San Diego* are largely distinguishable from reasonable restrictions on residential subdivision development. Whatever its application in other contexts, Justice Brennan's admonition is not applicable to this case, which does not involve the extraordinary use of regulatory power for confiscatory purposes.

⁵⁰ Just last month, the Court unanimously rejected the contention that a Corps of Engineers regulation requiring issuance of a permit for construction on land falling within a newly expanded category of "wetlands" gave rise to a Fifth Amendment claim for just compensation. In *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985), the Court held that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

impair the value of private property." 105 S.Ct. at 3125 (Stevens, J., concurring)). He further noted that the "impairment [of property values] may occur in one of two ways. The substance of a restriction may permanently curtail the economic value of the property. Or the procedures that must be employed, either to obtain permission to use property in a particular way or to remove an unlawful restriction on its use, may temporarily deprive the owner of a fair return on his investment." *Ibid.* The first category he termed "permanent harms" and the latter category "temporary harms."

Justice Stevens correctly notes that some permanent harms are permissible even if no compensation is paid, citing *Penn Central*.⁵¹ Except possibly in the most egregious cases, zoning regulations do not require compensation. The Court has repeatedly made this clear. *E.g.*, *Belle Terre*; *Euclid*. Most recently, in *Loretto*, which required compensation for physical occupation resulting from the attachment of television cables, the Court cautioned that "[w]e do not . . . question the . . . substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property. 458 U.S. at 441."⁵²

Unlike the physical occupation invalidated in *Loretto*, but like the broad regulatory power recognized in that case, this case calls into question a routine land use decision by the County Board of Supervisors of Yolo

⁵¹ Justice Stevens distinguished two other types of permanent harms: those that are impermissible even if the government is willing to pay for them (such as decisions based on impermissible First Amendment motivations), and those that are permissible if the government compensates the property owner for his loss, citing *United States v. 50 Acres of Land*, 105 S.Ct. 451 (1984).

⁵² *Loretto* was decided after *San Diego*, and yet we note that Justice Brennan, who would have found a taking in *San Diego*, joined in Justice Blackmun's dissent, which would have found none in *Loretto*. The dissent concluded that the required installation of cable was a valid regulatory measure. 458 U.S. at 442 (Blackmun, J., dissenting).

County. Appellant, claiming permanent denial of all viable use of its land, insists that the action is a taking as well as a violation of due process, and that just compensation or damages is required. Appellant errs; neither compensation nor damages are required by the facts of this case.⁵³

The regulations applied to the appellant's property do not constitute a taking.⁵⁴ The land remains, as it was purchased, ready for development. It is not limited to agricultural uses and, in fact, the property is zoned not for agricultural use but for certain levels of residential development that would permit many potentially profitable uses of the land. Appellant therefore has rights to development under the present zoning regulations without any subdivision. Appellant's proposal for a particularly intensive development was denied on health and safety grounds. See J.A. 77 ¶¶ B, C.

Appellant may also attempt to remedy the problems that the County Board found in the subdivision proposal. Appellant may seek annexation to the county service district for sewer service and develop an alternative plan for street access. Alternatively, appellant may submit a plan for a less intensive development that will require a lower level of public service. See Brief of Appellees at 26-33. In sum, the facts of this case do not come anywhere close to supporting what is, under this Court's

⁵³ See discussion of the role of a demurrer under California law in Brief of Appellees at 1-3, 24-26.

⁵⁴ Before the Court decides the taking issue, it must first determine that the question is properly before it; that is, that the County's decision was final so that the developer had no further opportunity under state law to advance the development of his property. *Williamson Cty. Reg. Pl. Comm'n v. Hamilton Bank*, 105 S.Ct. 3108 (1985). *Amici* agree with appellees that this case is not ripe for decision at this time (Brief of Appellees at 22-23). We note that the federal government, as *amicus curiae* in support of appellant also expresses concern that "the procedural posture of the case makes for an extremely abstract presentation" of the compensation issue. Brief of United States at 10-11.

cases, the extraordinary claim that regulation of the property has been so excessive as to give rise to a right to just compensation if imposed on a permanent basis.

With regard to temporary takings, Justice Stevens explained, "[i]f the Government fails to convince the court that . . . it is . . . entitled to impose an uncompensated permanent harm on the property owner . . ., there is nothing in the Constitution that prevents the Government from electing to abandon the permanent-harm-causing regulations." 105 S.Ct. at 3125 (concurring opinion). Upon such abandonment, the formerly "permanent" harm becomes a temporary harm.⁵⁵ In Justice Stevens' words, temporary harms "that are a by-product of governmental decisionmaking" (*id.* at 3126) do not give rise to a right to compensation.⁵⁶ Such harms

⁵⁵ Justice Stevens distinguishes temporary harms "that result from a deliberate decision to appropriate certain property for public use for a limited period of time," citing *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (the condemnation of a laundry to be used by the military for the duration of World War II); and *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (the condemnation of the unexpired term of a lease). 105 S.Ct. at 3216.

⁵⁶ The brief for the federal government asserts (at 20):

Because regulation of land may constitute a "taking" within the contemplation of the Fifth Amendment, and because a temporary appropriation of land likewise can constitute a "taking," it would seem to follow inexorably that a regulatory restriction on the use of land that is of only temporary duration may also, in appropriate circumstances, constitute a "taking" that implicates the Just Compensation Clause.

Amici question the value of this syllogism because its first premise is the issue in this case; and it is unhelpful to the analysis merely to assume the answer.

Moreover, *amici* would point out that the syllogism, even if logically and legally compelled, was not so "inexorable" that the federal government perceived it before now. In fact, its prior submission to this Court as *amicus curiae* states that "even if the permanent application of a regulatory measure would effectively destroy [a landowner's] interest in the property and thus constitute a taking,

are "fairly characterized as an inevitable cost of doing business in a highly regulated society. [These] harms are an unfortunate but necessary by-product of disputes over the extent of the Government's power to inflict permanent harms without paying for them."

The Court has recognized repeatedly that there is no "taking" until final action is taken against the landowner. *E.g.*, *Riverside Bayview Homes*, 106 S.Ct. at 459; *Williamson County*; *Agins*; *Danforth v. United States*, 308 U.S. 271, 284-86 (1939). The other types of regulations, such as health or traffic, that Justice Stevens notes may also cause "temporary harm," confirm the nature of zoning as police power regulation and support the conclusion that temporary regulatory harms, including zoning, do not constitute a taking.

The reason why the mere act of imposing regulations does not constitute a taking is that regulation is the very essence of government. Every significant action by government may affect someone's economic rights.⁵⁷ As important as is the need to impose permanent regulations in the public interest without incurring financial liability for the immutable investment-based expectations of the

it would not necessarily follow that a temporary application of the measure has that effect" In a lengthy discussion, the federal government explained that the requirement that the landowner maintain the *status quo* for a reasonable period of time to allow a determination of the validity of the regulation could not be considered a taking. Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Williamson Cty. Reg. Pl. Comm'n v. Hamilton Bank*, No. 84-4, at 29 n.20.

⁵⁷ The decision, for example, to shift police patrols around in a city can affect property values, causing them to rise in areas that receive increased patrols and to decrease in those areas that receive less. Mere debate over whether to impose regulations can significantly affect property values. For example, debate over where to put a highway through a residential neighborhood might cause the property values in the areas being considered to decline; debate over where to locate a mass transit stop may cause the values in the areas being considered to rise.

property owners, the need merely to *propose* them is even more important.⁵⁸ State and local governments must be able to go through the process: they must be able to make decisions and have them tested, in court, if necessary. The power to regulate is at the core of government; without it, government cannot govern.

In this case, appellant asks the Court to rule that a good faith effort by public officials to regulate land development in the public interest exposes the County and City to financial liability for the disappointment of "investment-backed expectations," should its effort ultimately fail to receive final judicial approval.⁵⁹ Overzealous regulation may be corrected by judicial invalidation. Moreover, if the regulatory process itself is unfair or delayed, the property owner may have an action for denial of his procedural rights. But the imposition of a regulation, later invalidated, must be viewed as "an inevitable cost of doing business in a highly regulated society."

⁵⁸ The Court has noted that loss of future profits, the basis generally asserted for land use taking claims, "provides a slim reed upon which to rest a takings claim." *Andrus v. Allard*, 444 U.S. at 66. Yet this "slim reed" is said to give rise to a claim of *temporary* taking. It is also ironic that the context that created the furor about temporary regulatory takings is zoning. In the zoning context, *permanent* regulation found to diminish the value of the property by as much as 87½%, has been upheld. See *Hadachek v. Sebastian*, 239 U.S. 394 (1915); see also *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75%). Thus, the claim to compensation for an *interruption* of land use attempts to invoke greater protection for a landowner who has suffered that temporary harm than is afforded to a landowner suffering from the permanent harm of *prohibited* land use. In any event, land values are subject to so many different influences (e.g., economic recession, population shifts, labor costs, natural catastrophes) that it is nearly impossible to evaluate the impairment of "investment-backed expectations" caused by a mere delay in development.

⁵⁹ In this case, of course, the appellant has not even pursued the remedy designated by the State for review of its challenge to the County's action. See Brief of Appellees at 19-22.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

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January 27, 1986

AMICUS CURIAE

BRIEF

JAN 27 1986

JOSEPH F. SPANIOL, JR.
CLERK

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NATIONAL PARKS AND CONSERVATION
ASSOCIATION, AND PRESERVATION ACTION
IN SUPPORT OF APPELLEES**

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 42(2), the above listed organizations file this brief as *Amici Curiae* in support of Appellees. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and promotion of the natural and built environment and with land use regulation and planning. All *Amici* seek to encourage environmentally and economically sound land use policies and are seriously concerned by the implications for environmental, historic preservation, and land use regulations unless this Court sustains the decision below. A more detailed description of each *Amicus* appears in Appendix A to this brief.

SUMMARY OF ARGUMENT

Justice Holmes Did Not Intend To Use The Word "Taking" Literally

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) Justice Holmes did not intend to use the word "taking" literally, nor did he intend to say that a regulation that goes too far actually effects a "taking" for which just compensation must be paid under the fifth amendment. The word "taking" was widely used in a non-literal sense at the time of *Pennsylvania Coal*. See *Block v. Hirsch*, 256 U.S. 135 (1921); *Budd v. People of the State of New York*, 143 U.S. 517 (1892).

In addition, there are contemporary examples of the non-literal use of the word "taking". See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

"Mere Regulation" Does Not Constitute A "Taking" In The Constitutional Sense

What constitutes a "taking" in the constitutional sense (a compensable event) depends upon the character of the governmental action, and a "mere regulation" that does not involve the creation of a public domain or which does not permanently harm or destroy private property does not constitute an "extreme" circumstance such as to effect a compensable event. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455 (1985); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108 (1985).

Invalidation is an Adequate Remedy

A regulation that is judicially declared to be overly restrictive is invalid, *void ab initio*, and the appropriate remedy is invalidation. "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Agins v. City of Tiburon*, 447 U.S. at 263 n.9. The remedy of invalidation is being effectively provided by this Court and courts throughout the nation when a regulation is held to be invalid. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

ARGUMENT

INTRODUCTION

In this cause, the Court is once again confronted by the so-called "taking issue"¹—whether a landowner is entitled to compensation under the fifth and fourteenth amendments for a "taking" when a regulatory action is judicially declared to be overly restrictive.² On several prior occasions this Court has taken up the issue, however, in each case careful scrutiny

¹ F. Bosselman, D. Callies & J. Banta, *The Taking Issue* (C.E.Q. 1973) [hereinafter cited as *The Taking Issue*]. The "taking" issue has been described as the "lawyers equivalent of the physicist's hunt for the quark." C. Haar, *Land Use Planning* 766 (3rd ed. 1966). *Amici* respectfully submit that a more apt analogy would be the search for the abominable snowman, a search based on myth, rumor and plain hoaxes. In contrast, the quark hunt was the product of deliberate science, mathematical calculations and the use of established principles of physics.

² It is now well-established that a regulation which goes so far as to prevent all beneficial use of private property is unconstitutional, though what constitutes a "beneficial use" differs according to the natural and inherent character of the property. See, e.g., *United States v. Riverside Bayview Homes*, 106 S.Ct. 455 (1985); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914); *United States v. Welch*, 217 U.S. 333 (1910); *Budd v. New York*, 143 U.S. 517 (1892); *Dow v. Beidelman*, 125 U.S. 680 (1888) and *Miller v. Harton*, 152 Mass. 540, 26 N.E. 100 (1891). But see *Sentell v. New Orleans*, 166 U.S. 698, 704 (1897):

That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing, but that does not

(Footnote continued on following page.)

revealed that the issue was not ripe for a holding on the merits.³ *Amici* are doubtful that this cause provides an appropriate vehicle for resolution of the issue because once again the complaint, as the California court decided, fails to state a cause of action. *Amici* are aware that the City and County and other *amici* are presenting persuasive argument in support of the California court's decision; nevertheless, *Amici* submit this brief on the merits in the event that this Court should determine to reach the "taking issue."

Appellant argues that Justice Brennan's analysis in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981), and this Court's opinion in *Ruckelshaus v. Monsanto Co.* 104 S.Ct. 2862 (1984), dictate a holding that an overly restrictive regulation is always compensable under the fifth amendment. *Amici* respectfully disagree with Appellant and submit that a regulatory action, even one that goes "too far,"⁴ does not constitute a compensable taking of private property for public use (that is, a "taking" in the constitutional sense) unless an element of a private domain is converted into a public domain, or an interest in property is actually destroyed.

(Footnote continued from preceding page.)

stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that too, without recourse against such authorities for the trespass.

See also *Lawton v. Steele*, 152 U.S. 133 (1894). What constitutes a minimum beneficial use is sometimes obscure but is clearly affected by the natural character and setting of property. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928); *Just v. Marinette County*, 56 Wis. 297, 201 N.W.2d 761 (1972); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981).

³ See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108 (1985); and most recently, *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 460 n.6 (1985).

⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The taking issue, as presented to this Court, involves a matter of vital public importance — the police power, a fundamental attribute of an organized society. As Justice Holmes put it: "It may be said in a general way that the police power extends to all the great public needs." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). Long ago, this Court recognized the fundamental nature of the police power and its critical role in a democratic society.

It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.

Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915). The police power lies at the very heart of countless public efforts directed at the conservation and protection of a variety of values and interests that would be harmed by unrestricted private action, actions that are ever-more complex and difficult to manage.

[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926). The importance of the police power in an organized society is perhaps best expressed in this Court's landmark decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). On numerous other occasions, this Court has recognized the importance of the police power. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (noise regulations);

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (dredging and pit excavating); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (family values, youth values, and the blessings of quiet seclusion and clean air); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (city's interest in planning and regulating undesirable commercial uses of property); *Agins v. Tiburon*, 447 U.S. 255 (1980) (avoiding unnecessary conversion of open space land to strictly urban use); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (aesthetics and sign regulations); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (quality of life); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 38687 (1926) (neighborhood values); *Berman v. Parker*, 348 U.S. 26 (1954) (downtown redevelopment); *Mugler v. Kansas*, 123 U.S. 623 (1887) (liquor control).

Other courts have also noted the importance of the police power in protecting important public values. See, e.g., *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972) and *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981), cert. denied sub nom. *Taylor v. Graham*, 454 U.S. 1083 (1981) (wetlands); *Wilson v. County of McHenry*, 92 Ill.App.3d 997, 416 N.E.2d 426 (1981) (conservation of prime agricultural lands); *Fish and Wildlife Department v. Land Conservation and Development Commission*, 37 Or. App. 607, 588 P.2d 80 (1978), aff'd. on other grounds, 288 Or. 203, 603 P.2d 1371 (1979) (wildlife protection); *Scott v. State Highway Commission*, 23 Or. App. 99, 541 P.2d 516 (1975) (scenic rivers); *Maher v. City of New Orleans*, 516 F.2d 1051, 1059 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976) (objective of French Quarter historic preservation ordinance within the permissible scope of the police power); *Lafayette Park Baptist Church v. Board of Adjustment of City of St. Louis*, 599 S.W.2d 61 (Mo. 1980) (historic preservation district); *Camille Corp. v. Phares*, 705 F.2d 223 (7th Cir. 1983) (drug paraphernalia ordinance upheld); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (hand gun prohibition); and see Fla. Stat.

§ 372.072 (1985) (state endangered species act); § 440.56 (worker safety rules); §§ 553.70-553.895 (building safety codes) as examples of the important and varied public values that the police power serves.

Plainly put, with increasing pollution and development associated with a complex society, protection of the natural, scenic, historic and economic resources of this nation depend upon exercises of the police power. To hold that damages are payable whenever a regulation goes too far, will undoubtedly undermine this nation's capacity to deal with pressing needs to conserve the public values inherent in our natural and built environment. *Amici* urge this Court to approach this issue with great respect and deference for the delicate balance of powers that has served this nation for years, the very deference this Court showed in *Penn Central*, an opinion reminiscent of Justice Harlan's admonition of nearly a century ago:

If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits, of intoxicating liquors, for other than medical, scientific, and mechanical purposes, to be necessary to the peace and security of society, *the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives*. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department.

Mugler v. Kansas, 123 U.S. 623, 662 (1887) (emphasis added).

I.

THAT A REGULATION HAS GONE TOO FAR DOES NOT MEAN THAT A COMPENSABLE EVENT HAS OCCURRED

If this Court determines that Appellant in fact states a cause of action and that this case is ripe for review, then the

question presented is whether the application of an overly restrictive regulation actually constitutes a compensable event under the fifth amendment.⁵ Appellant argues in favor of this proposition, relying upon the dissent in *San Diego Gas & Electric* ("The principle applied in all these cases has its source in Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*...." 450 U.S. at 649) which relies upon Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), wherein Justice Holmes stated:

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Id. at 415. *Amici* respectfully disagree with Appellant and submit that the literal reading of the Holmes' opinion on which Appellant's compensation argument is based is but a "slender reed"⁶ and is neither supported by the full opinion in *Pennsylvania Coal* nor by the precedents on which *Pennsylvania Coal* was based.⁷

⁵ The term "taking" itself is a source of much of the confusion and obfuscation in regard to the "taking issue." For years the courts have referred to "takings" in the constitutional sense, yet no real definition of such a taking or any other kind of "taking" has emerged. And, its indiscriminate and inconsistent use by commentators and the courts has done much to obscure the legal question presented to this Court. For example, in this Court's recent opinion in *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455 (1985), the taking issue was described as follows: "whether compensation is a constitutionally mandated remedy for 'temporary regulatory takings....'" *Id.* at 460 n.6. The use of the word "taking" in this formulation of the issue begs and compounds the question because compensation is required if the action constitutes a "taking" in the constitutional sense. The real question goes not to the word "taking" but to what is the constitutional sense; that is, what is compensable under the constitution.

⁶ *Andrus v. Allard*, 444 U.S. 51 66 (1979).

⁷ Furthermore, it is doubtful that the authors of the Bill of Rights had any idea that a regulatory effort that failed to pass judicial scrutiny, for whatever reason, would give rise to a cause of action for just compensation for the period during which the invalid regulation is in effect. One searches in vain for any explanation for the just

(Footnote continued on following page.)

A.

Justice Holmes Did Not Intend To Use The Word "Taking" Literally

Justice Holmes' intent in his use of the word "taking" in *Pennsylvania Coal* has been the subject of extensive debate—whether the term was intended to have the strict literal meaning advanced by Appellant or whether Justice Holmes used the term in some non-literal or metaphorical sense.⁸ In *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), the New York Court of Appeals observed:

(Footnote continued from preceding page.)

compensation clause beyond the idea that when a citizen's property is actually pressed into the service of the government, the owner of the property should not be required to bear the cost of that service alone. See *The Taking Issue*, *supra*, n.1 at 97-104. And indeed, when James Madison's first draft of what was to become the fifth amendment was introduced to the House of Representatives, the intention of the author was clearly focused on actual use or occupation of property.

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to *relinquish his property*, where it may be necessary for public use, without a just compensation.

"Madison Debates," 1 *Annals of Cong.* 451-452 (J. Gales ed. 1789) (emphasis added). See generally, Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 595 (1972); E. Dumbauld, *The Bill of Rights and What it Means Today*, at 207 (1979). There is no evidence whatsoever that this intent ever waived as the clause evolved and was adopted as the fifth amendment.

⁸ See, e.g., Kanner, *Inverse Condemnation in an Era of Uncertainty*, in Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning and Eminent Domain, 177 (1980); Mandelker, *Land Use Takings: The Compensation Issue*, 8 Hastings Const. L. Q. 491 (1981); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984); Siemon, *Of Regulatory Takings and Other Myths*, 1 Fla. St. U. J. Land Use & Envtl. L. 105 (1985) (Mr. Siemon appears on this brief as Counsel for *Amici Curiae*. His articles are therefore not cited as authority but as an example of the nature of the "great debate" that surrounds the taking issue and as a contemporary discussion of the issue.)

True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised....

The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, any more than in the *Pennsylvania Coal* case, was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory." *Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause....*

39 N.Y.2d at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9 (citations omitted) (emphasis added). In his dissent in *San Diego Gas & Electric*, however, Justice Brennan rejected the metaphor analysis as "tampering with the express language of the opinion" and ignoring "the coal company's repeated claim before the Court that the Pennsylvania statute took its property without just compensation." 450 U.S. at 649 n. 14. With all due respect, *Amici* urge that an *in pari materia* reading of *Pennsylvania Coal* reveals that Justice Holmes did not intend to use the word "taking" in a literal sense; and that Justice Holmes did not intend to say that a regulation that goes too far actually effects a "taking" for which just compensation must be paid under the fifth amendment.

Perhaps the best evidence that Justice Holmes did not intend the word "taking" to have a strict literal meaning is the opinion itself. Early in the opinion, prior to the now-famous "taking" quote, Justice Holmes used the word "taking" in what is obviously a non-literal sense⁹ when he described the issue before the Court:

This is the case of a single, private house. No doubt there

⁹ "Non-literal" is used herein to denote the use of the word "taking" as something other than actually "taken for public use" under the fifth amendment. The Court has traditionally referred to "takings" in the constitutional sense, clearly recognizing that there are "takings" which are not in the "constitutional sense." See e.g. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case....The extent of the public interest is shown by the statute to be limited....On the other hand the extent of the taking is great.

260 U.S. at 413-14 (citations omitted) (emphasis added). Clearly the word "taking" in this passage of *Pennsylvania Coal* was not used in a literal sense because a taking in the constitutional sense is a taking no matter what its size. See, e.g., *San Diego Gas & Electric*, 450 U.S. at 654 (Brennan, J., dissenting).

Moreover, Justice Holmes stated in the opinion that it was his view that the statute at issue in *Pennsylvania Coal* was invalid, without even a hint that just compensation was to be paid for the period of time the statute was in effect. In point of fact, Justice Holmes went on to say that if the State of Pennsylvania wished to go so far as to eliminate the "right to mine coal," then it could not do so by regulation.

It is our opinion that the act *cannot be sustained as an exercise of the police power....*

....

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that *would warrant the exercise of eminent domain.*

260 U.S. at 414-16 (emphasis added).

Even more important, the word "taking" was widely used in a non-literal sense at the time of *Pennsylvania Coal*. In *Block v. Hirsch*, 256 U.S. 135 (1921), decided just one year prior to *Pennsylvania Coal*, Justice Holmes used the word "taking" in an unmistakably non-literal way:

[T]he notion that the former [tangible property] are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense,

under which property rights may be cut down, and *to that extent taken, without pay.*

Id. at 155 (emphasis added). Earlier, in *Budd v. People of the State of New York*, 143 U.S. 517, 547 (1892), this Court discussed the scope of the police power and used the word "taking" in a clearly non-literal sense: "amounted to a *taking* of it [property] without due process of law...." (emphasis added).¹⁰

B.

The Word "Taking" Is Used In A Non-Literal Sense In Contemporary Opinions

In addition, there are contemporary examples of the "metaphorical" or non-literal use of the word "taking." In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court used the word "taking" in an obviously non-literal sense:

The application of a general zoning law to particular property effects a *taking* if the ordinance does not substantially advance legitimate state interests....

Id. at 260 (emphasis added). The quoted language plainly states that a regulation that does not serve a legitimate public interest is a "taking," even though it is indisputable that such a circumstance is not a compensable event under the fifth amend-

¹⁰ See e.g. *Dow v. Beidelman*, 125 U.S. 680, 689 (1888) ("[N]either can it do that which in law amounts to a *taking* of private property for public use, without just compensation, *or without due process of law.*") (emphasis added); *Manigault v. Springs*, 199 U.S. 473, 484 (1905) ("The question [is] whether the overflow of lands constitutes a taking *within the constitutional provision.* . . .") (emphasis added); *Atlantic L. R. Co. v. City of Goldsboro*, 232 U.S. 548, 558-59 (1914) ("an unconstitutional *taking of property* without compensation *or without due process of law.*") (emphasis added); *Missouri Pac. Ry. Co. v. State of Nebraska*, 164 U.S. 403, 417 (1896) ("The *taking* by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, *is not due process of law*, and is a violation of the fourteenth article of amendment of the constitution of the United States.") (emphasis added); *State of Washington v. Fairchild*, 224 U.S. 510, 517 (1912) ("was so unreasonable as to amount to a *taking of property without due process of law.*") (emphasis added). See also, 1 Fla. St. U. J. Land Use & Envtl. L. 105, 114 n.61 (1985).

ment but is rather a violation of the due process clause.¹¹ Recently in *Riverside Bayview Homes*, Justice Blackmun restated the very same metaphor:

We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a "taking" of the affected property. We have never precisely defined those circumstances; but our general approach was summed up in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), where we stated that *the application of land use regulations to a particular piece of property is a taking only "if the ordinance does not substantially advance legitimate state interests...."*

106 S.Ct. at 459 (citations omitted). To the same effect Justice Brennan observed in *Penn Central* that:

It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" *if not reasonably necessary to the effectuation of a substantial public purpose....*

438 U.S. at 127 (emphasis added).¹² That the term "taking" is used metaphorically in the above-quoted passages is clear, as it should be, because the word "taking" has never been used in the strict literal sense invoked by the advocates of just compensation for so-called "regulatory takings."

C.

An Overly Restrictive Regulation Violates The Due Process Clause

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108, 3123 (1985),

¹¹ Moreover, the government's right to take private property is limited to circumstances of public necessity (defined by this Court to be coincident with "public purpose" in the police power sense). See *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321, 2329 (1984). If a regulation which failed to serve a legitimate purpose constitutes a taking, the anomalous circumstance of a taking for a non-public use would occur. This anomaly is easily disposed of if the requirement that a regulation serve a valid public purpose is recognized as a due process standard, and not as a just compensation requirement.

¹² In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980), Justice Rehnquist referred to a "taking" in the constitutional sense, clearly recognizing that there are "takings" that are not "takings" in the constitutional sense.

Justice Blackmun, for the Court, suggested that the "taking issue" turns on whether the Holmes' standard was derived from the just compensation or due process clause. *Amici* maintain that there can be no real question on this point and that the constitutional standard that a regulation may not go so far as to have an effect that is equivalent to a taking is derived not from the just compensation clause, but from the due process clause.

In *Pennsylvania Coal* Justice Holmes himself stated that the issue before the Court was "due process" of law.

As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and *due process* clauses are gone.

260 U.S. at 413 (emphasis added).¹³

¹³ Unfortunately, Justice Holmes' opinion in *Pennsylvania Coal* has been broadly misunderstood and misconstrued far beyond the issue of the meaning of the word "taking." In *Penn Central*, this Court suggested that *Pennsylvania Coal*:

is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking."

Penn Central, 438 U.S. at 127 (emphasis added). The trouble is that one of the flaws Justice Holmes observed in the *Pennsylvania* statute was that it did not substantially advance an important public policy:

The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. . . . If we were called upon to deal with the plaintiff's position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

Pennsylvania Coal, 260 U.S. at 413-14.

In *Block v. Hirsch*, Justice Holmes announced what is in effect the minimum beneficial use rule in an obvious precursor to his opinion in *Pennsylvania Coal*.¹⁴

All elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes *too far*. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a *taking without due process of law*.

Block v. Hirsch, 256 U.S. at 156 (emphasis added). See, also, *Chicago, B & Q. R. Co. v. State of Illinois*, 200 U.S. 561, 565 (1906) ("upon the ground that a judgment in favor of the commissioners would take its property for public use without compensation, and therefore without due process of law. . . .") (emphasis added); *Mississippi Railroad Comm. v. Mobile & Ohio R. Co.*, 244 U.S. 388, 391 (1917) ("If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, passes beyond lawful bonds, and such action is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States.") (emphasis added); *Delaware L. & W. R. Co. v. Town of Morristown*, 276 U.S. 182, 193 (1928) ("The state may not require it [private property] to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment.") (emphasis added).

More recently, this Court in *Penn Central* asserted that precedents hold that a regulation that goes too far is invalid, a non-literal and, *Amici* suggest, correct reading of Holmes' opinion:

Indeed, we have frequently observed that whether a particular restriction will be rendered *invalid* by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

438 U.S. at 124 (emphasis added).

¹⁴ Justice Holmes writing on the subject of the "taking issue" was consistent with his opinions prior to his tenure on the Supreme Court. See e.g., *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889).

II.

**WHAT CONSTITUTES A "TAKING"
IN THE CONSTITUTIONAL SENSE
DEPENDS UPON THE CHARACTER
OF THE GOVERNMENTAL ACTION
AND THE IMPACT OF
THE ACTION ON DISTINCT
INVESTMENT-BACKED EXPECTATIONS**

The fact that Justice Holmes' opinion in *Pennsylvania Coal* does not command just compensation for an overly restrictive regulation does not dispose of the question before this Court because there are particular circumstances where a regulatory action is compensable under the fifth amendment because an actual taking has occurred.¹⁵ In *Ruckelshaus v. Monsanto Co.*, this Court noted that:

The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations."

104 S.Ct. at 2874-2875 (citations omitted). *Amici* submit that application of these factors to a land use regulatory action that does nothing more than restrict private use of private property shows that "mere regulation"¹⁶ does not effect a "taking" in the constitutional sense.

A.

Character Of The Governmental Action

Amici recognize that there are particular circumstances

¹⁵ See, e.g., *United States v. Clarke*, 445 U.S. 253 (1980); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

¹⁶ As used herein, the term "mere regulation" is intended to refer to a regulatory action that does nothing more than restrict private use of private property and does not have the effect of creating a public domain, even a temporary one, or of permanently harming or destroying the property.

where a regulatory action is compensable under the fifth amendment because an actual taking has occurred. For example, where a regulation requires that private property be thrown open to public use there can be little doubt that a taking was intended and has occurred. See, e.g., *Fred F. French Investing Co.*, 39 N.Y.2d 587, 350 N.E.2d 380. The same is true where a regulation requires that private property be used for public purposes. See, e.g., *Chicago, B. & Q. R. Co. v. State of Illinois*, 200 U.S. 561 (1906). The statute in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) which authorized the actual occupation of private property illustrates a regulatory action that involves "actual invasion." *Ruckelshaus v. Monsanto Co.* is another recent example of a regulation considered by this Court that involved more than "mere regulation." That is so because the regulation at issue was alleged, at least under some circumstances, to convert a private domain (trade secrets and research information) into a public domain (available to competitors). *Amici* submit that the fact that some regulatory efforts result in more than a limitation on private use of private property does not mean that a "mere regulation" is the kind of governmental action that constitutes a compensable event.

1.

**"Mere Regulation" Does Not Constitute
A "Taking" In The Constitutional Sense**

Amici submit that in order for a regulatory action actually to constitute a compensable taking under the fifth amendment, there must be something more than a temporary interference with a property owner's private use of his property.¹⁷ And,

¹⁷ In *United States v. Riverside Bayview Homes*, 106 S.Ct. 455 (1985), this Court noted that: "governmental land-use regulation may under extreme circumstances amount to a taking of the affected property." *Id.* at 459 (emphasis added). *Amici* suggest that the "extreme" circumstances contemplated in *Riverside Bayview Homes* involve something more than a mere limitation on private use of private property. In other words, "mere regulation" alone does not constitute such an "extreme" circumstance as to constitute a "taking" in the constitutional sense, even if the regulation is subsequently determined to have been overly restrictive.

Appellant's reliance upon this Court's recent opinions in *Ruckelshaus* and *Riverside Bayview Homes* for the proposition that "just

(Footnote continued on following page.)

Amici are unaware of any case decided by this Court where a regulatory action that is unaccompanied by physical occupation, creation of a public domain or actual destruction of property has been declared to effect a "taking" in the constitutional sense. In every single case decided by this Court in which compensation was required, there existed some interference with property beyond a prohibitive regulatory action.

2.

**Judicial Transmogrification Of
"Mere Regulation" Into An Actual Taking
Violates The Doctrine Of Separation Of Powers**

Another important reason why "mere regulation" should not be subject to judicial transmogrification into an exercise of the power of eminent domain is because to do so would do substantial violence to the doctrine of separation of powers.¹⁸ That is so because a judicial decision that a regulatory action actually effects a compensable taking would displace a very

(Footnote continued from preceding page.)

compensation, not invalidation, is the 'preferred' remedy for a Fifth Amendment taking" is also misplaced. (Appellant's brief at 9). In *Ruckelshaus*, this Court did state that:

Equitable relief is not available to enjoin an alleged taking of private property for a public use, *duly authorized by law*, when a suit for compensation can be brought against the sovereign subsequent to the taking.

104 S.Ct. at 2880 (footnote omitted) (emphasis added). However, Appellant passes over a key portion of the statement; that is, the requirement that the action involved must be "*duly authorized by law*," a circumstance that does not exist where a regulation is found to have gone too far. As this Court stated in *Penn Central*, the law has always been that a regulatory action that goes "too far" is invalid, and *Amici* submit that, absent physical invasion, creation of a public domain or permanent injury or destruction, a regulatory action does not constitute a compensable event.

¹⁸ If a "mere regulation" were considered a compensable taking, the courts would be inexorably drawn into the daily affairs of local government and would accomplish an ironic perversion of Justice Holmes' philosophy of deference to legislative discretion: "The widest scope must be permitted to the inventions of statesmanship, the experimentation and bunglings of legislatures." Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 Harv.L.Rev. 909, 928-9 (1923).

important legislative responsibility — judging whether a particular public purpose merits an appropriation of available public funds. When a legislative body legislates, its inquiry focuses on the legitimacy of the public purpose to which a regulation is directed. The decision whether to act or not turns on a policy judgment as to the desirability of the identified public objective. In contrast, a decision to achieve a particular public purpose by eminent domain goes further and involves a balancing of all other public objectives. It includes a policy judgment as to whether the particular need outweighs all other competing objectives, and therefore merits an appropriation of what may be limited financial resources. If a court could, by the simple act of declaring that a regulation goes "too far," convert an intended regulatory action into a financial commitment of the public fisc, then the balance of powers implicit in the doctrine of separation of powers would be substantially disturbed. In contrast, if the remedy for an overly restrictive regulation is invalidation, the balance of powers is easily conserved.¹⁹

Appellant dismisses the separation of powers argument by use of the epithet "chilling" and suggests that public tort liability imposes unanticipated revenue demands on governmental authorities without damage to the separation of powers doctrine. Passing over Appellant's failure to advance empirical evidence for the assertion, *Amici* submit to this Court that Appellant's argument does not survive even minimal examination. First, the legislatures of the many states and of the United States have, as a matter of public policy, decided that tort liability is appropriate, a circumstance that does not pertain to regulatory actions. Second, tort liability involves a violation of an established duty of care derived from centuries of precedent involving the "reasonable man" standard. In con-

¹⁹ If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation.

Jacobson v. Tahoe Regional Planning Agency, 474 F.Supp. 901, 904 (D.Nev. 1979).

trast, the limits of the police power are not amenable to "set formula,"²⁰ and it is literally impossible to define a specific duty of care in regard to the limits of the police power.

We deal, in other words, with what traditionally has been known as the police power. *An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.*

Berman v. Parker, 348 U.S. 26, 32 (1954) (emphasis added). Moreover, police power regulation of land use is not reducible to simple equations and the constantly changing face of our nation condemns us to an ever-shifting standard of what will be determined "overzealous." Indeed, it would have been a bold and oracular official²¹ who could have predicted with confidence that the Supreme Court of Wisconsin would sustain the wetlands regulations at issue in *Just v. Marinette County*. The idea of a "duty of care" on which tort liability is predicated simply will not work in the face of the amorphous constitutional standards that control planning law.²²

²⁰ "[T]his court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²¹ The results of a survey of its members by the National Association of County Planning Directors confirm this analysis. When presented with a hypothetical factual situation closely paralleling that held to be permissible regulation by this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (closing of quarry through police power regulation), 48 percent of the nearly 300 respondents indicated that they would attempt to close the quarry and risk invalidation of their action, while only 8 percent said they would do so if confronted with the possibility of a damage award for excessive police power regulation. See National Association of County Planning Directors, *Zoning Survey Results* (September 1980).

²² *Amici* urge this Court to be mindful of Justice Rehnquist's observation in his concurring and dissenting opinion in *Butz v. Economou*, 438 U.S. 478, 526-27 (1978):

It simply defies logic and common experience to suggest that officials will not have this [*i.e.*, the availability of damages] in

(Footnote continued on following page.)

3.

Temporary Interference In Private Use Of Property Is Not The Kind Of Governmental Action That Constitutes A "Taking" In The Constitutional Sense

In his concurring opinion in *Hamilton Bank*, Justice Stevens articulated a "takings" analysis that *Amici* submit is both logical and supported by precedent.

Temporary harms resulting from a regulatory decision fall into two broad subcategories: (1) those that result from a deliberate decision to appropriate certain property for public use for a limited period of time; and (2) those that are a by-product of governmental decisionmaking. The first subcategory includes, for example, the condemnation of a laundry to be used by the military for the duration of World War II, or the condemnation of unexpired term of a lease, — that type of appropriation is correctly characterized as a "temporary taking." The second subcategory is fairly characterized as an inevitable cost of doing business in a highly regulated society.

....
If his property is harmed — even temporarily — without due process of law, he may have a claim for damages based on the denial of his procedural rights. But if the procedure that has been employed to determine whether a particular regulation "goes too far" is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.

105 S.Ct. at 3126-27 (Stevens, J. concurring) (footnote and citations omitted). *Amici* urge this Court to adopt Justice Stevens' analysis because it is consistent with and supported by established jurisprudence.²³

(Footnote continued from preceding page.)

the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected....

²³ See discussion at pp. 9-15.

It is, for example, well-established that development moratoria for defined periods of time do not violate constitutionally secured property rights.²⁴ Compensation for a "temporary interference" with private rights resulting from application of an overly restrictive regulation would of necessity overturn a century of settled moratoria law. Similarly, the temporary interference with private property that occurs when eminent domain proceedings are abandoned is not compensable under the fifth amendment. The rule is well-settled that:

"When condemnation proceedings are discontinued, even when there has been no disturbance of the actual occupancy of the land, the owner often suffers pecuniary loss during the pendency of the proceedings. It is difficult to find tenants and unsafe to build on the land. He [the owner] may stop work on a partly constructed building or adapt it to the proposed improvement. He is almost certain to have incurred an attorney's fee. But it is held, in the absence of bad faith or unreasonable delay upon the part of the party which instituted such proceedings, that the owner is not *constitutionally* entitled to recover such expenses and losses, and, when the statutes are silent on the subject, no damages will be awarded him [emphasis added].... The uncertainty caused by the probability that the proceedings will be carried through and the proposed work constructed over this land differs in degree only from that shared by the owners of all property, which may at any time be taken by eminent domain whenever it may chance to lie in the path of a public improvement, and the decrease in income or other loss he may suffer from such uncertainty is held to be *damnum absque injuria*."

Hamer v. State Highway Commission, 304 S.W.2d 869, 873 (Mo. 1957) (citing 6 *Nichols, Eminent Domain*, 3d ed. § 26.45).

²⁴ See *Schafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984); *A. Bernhard & Co. v. Planning and Zoning Commission*, 429 A.2d 801 (Conn. 1984); *Associated Home Builders v. City of Livermore*, 18 Cal.3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *Collura v. Town of Arlington*, 329 N.E.2d 733 (Mass. 1975); *City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. App. 1974); *State ex rel. Randell v. Snohomish County*, 488 P.2d 511 (Wash. 1971); *Deal Gardens, Inc. v. Board of Trustees*, 48 N.J. 492, 226 A.2d 607 (1967). *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 516, 35 Cal. Rptr. 480, 485 (1963).

See also *Garrison v. City of New York*, 88 U.S. (21 Wall.) 196 (1874); *Danforth v. United States*, 308 U.S. 271 (1939). Simply put, a temporary interference with private use absent an actual destruction or occupation of property does not rise to the level of invasion of private property rights that is compensable under the fifth amendment.

Even if the appellant's ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making absent extraordinary delay, are "incidents of ownership." They cannot be considered as a "taking" in the constitutional sense."

Agins, 447 U.S. at 263 n. 9.

B.

Impact On Distinct Investment Backed Expectations

Amici submit that the temporary interference effected by an overly restrictive regulation, absent the establishment of a public domain, physical occupation, or permanent injury or destruction of some element of the fee, does not frustrate distinct investment-backed expectations so as to effect a "taking" in the constitutional sense.

1.

Mere Diminution In Value Is Not A Taking In The Constitutional Sense

It is well settled that a mere diminution in value does not constitute a compensable event.²⁵

Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is constitutional....If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.

²⁵ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (diminution of 75%); *Hadacheck v. C.E. Sebastian*, 239 U.S. 394 (1915) (diminution of 87½%).

Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962). See also *Penn Central*, 438 U.S. at 131; *City of Clearwater v. College Properties, Inc.*, 239 So.2d 515, 517 (Fla. Dist. Ct. App. 1970). In *Andrus v. Allard*, 444 U.S. 51 (1979), this Court described the Hofeldian theory of property rights and pointed out that the destruction of one strand of the bundle of property rights does not constitute a taking "because the aggregate must be viewed in its entirety." *Id.* at 66. See also *Penn Central*, 438 U.S. at 130-31; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-36, 441 (1982). *Amici* submit that the regulatory interference in the use of land for which Appellant seeks just compensation affects only one part or one "strand" of the Hofeldian bundle of rights, the right to use property during a regulatory embroglio, and is therefore not literally a "taking."

Property has value in many dimensions, including total present worth and value over time. (Time sharing or interval ownership are contemporary examples of the division of property into temporal segments.) The mere inconvenience of a temporary interference in the use of land while a court tests the validity of a police power regulation destroys only a part or one strand of the bundle of rights of property and therefore can hardly be said to be a "taking" when viewed in the aggregate. Indeed, it takes precious little appreciation of real estate finance to grasp the fact that a temporary interference in the use of land may have far less impact on the aggregate value of a parcel of land than the diminution in value that was viewed as valid by this Court in *Goldblatt v. Town of Hempstead* or *Andrus v. Allard*. In fact, in comparison with the 75% diminution in value involved in *Village of Euclid v. Ambler Realty Company*, a mere temporary interruption in use pales in significance.²⁶

In other words, mere fluctuations in value during the process of governmental decisionmaking, including judicial review of local legislative decisions, absent extraordinary delay, should be recognized as mere "incidents of ownership," and should not be considered as a "taking" in the constitutional sense. *Agins*, 447 U.S. at 263 n.9. A temporary interference

²⁶ Consider for example, a \$100,000 parcel of land that is downzoned. If the diminution in value is only \$75,000 (the percent

(Footnote continued on following page.)

does not displace ownership with a public domain, physically invade a private domain, nor does it actually destroy an interest in property. To the contrary, a temporary interference, by definition, merely interrupts private use of property. At most, such an interference diminishes the cumulative value of property when considered over time, and it is well-settled that a mere diminution in value does not constitute a compensable "taking." *Id.*

III.

INVALIDATION IS AN ADEQUATE REMEDY

Amici submit that the proper remedy for a regulation that goes too far and therefore violates the due process clause is invalidation. Appellant argues that invalidation is no remedy at all because "as the Brennan *San Diego* opinion observes, some local regulators treat invalidation with disdain." (Appellant's brief at 18). Ignoring the fact that Justice Brennan referred to the remarks of but one city attorney for this proposition of "disdain," there is no evidence offered to support the proposition that invalidation does not constitute effective relief. Indeed, given the Appellant's tired reference to the same city attorney's 1975 remarks that were made light of in *San Diego Gas & Electric*, it may be assumed that the epidemic of local regulator "disdain" is not as bad as Appellant suggests. Indeed, *Amici* submit that if an epidemic in fact existed, the

(Footnote continued from preceding page.)

diminution in value in *Euclid*), then a minimum beneficial use is preserved to the owner, and the landowner's economic loss is deemed to be mere *damnum absque injuria*. In comparison, the diminution in value which results from the temporary application of a regulation that goes "too far" has a substantially smaller impact on investment-backed expectations. If the period of over-regulation were two years, for example, then the actual economic injury to the landowner would be lost rentals for the period ($15\% \times \$100,000 \times 2 \text{ yrs.} = \$30,000$). Use of contemporary economic theory to convert the loss of two years of rental income to a diminution in present value yields an impact that is far less than the mere injury suffered by the valid downzoning.

National Association of Homebuilders would have supplied this Court with an inventory of "horribles," rather than relying upon that one attorney's regrettable remarks, one law review article and a student note.

Amici submit that simply because just compensation is not available does not condemn the development community to a fruitless treadmill of bureaucratic abuse. Employing what is nothing more than a substantive due process standard (does the regulation bear a substantial relationship to the public health, safety and welfare), state courts have for years consistently provided expeditious and real relief in innumerable situations.²⁷ In Florida, for example, courts, in deference to the dignity of the legislative branch of government, regularly declare regulatory actions invalid and direct the offending agency to relax the invalid regulations in accordance with specific findings of fact and conclusions of law, or to institute eminent domain

²⁷ See, e.g., *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 469 F.Supp. 836, 853 (N.D. Ill. 1979) (federal court had authority to grant site-specific relief in the form of approval of consent decree calling for annexation and rezoning of parcel for low income housing project); *City of Homewood v. Caffee*, 400 So.2d 375, 378 (Ala. 1981) (building permit was ordered granted, subject to other land use restrictions, after invalidation of minimum lot size ordinances); *City of Sanibel v. Goode*, 372 So.2d 181, 183 (Fla. Dist. Ct. App. 1979) (where new comprehensive plan designation invalidated because it deprived property owner of only beneficial use, proper remedy was order to reclassify to commercial use); *Jeisey v. City of Taylorville*, 81 Ill. App.3d 442, 453, 401 N.E.2d 627, 635 (Ill. App. Ct. 1980) (ordinance invalid as applied; lower court's order rezoning property without remand to city council upheld); *Belkin v. City of Birmingham*, 87 Mich. App. 690, 704-705, 276 N.W.2d 465, 471 (Mich. Ct. App. 1978), modified in 406 Mich. 949, 278 N.W. 2d 43 (1979) (order enjoining enforcement of zoning classification and effectively rezoning parcel upheld on basis of court's inherent power to shape relief); *Allan-Deane Corp. v. Bedminister Township*, 205 N.J. Super. 87, 500 A.2d 49 (N.J. Super. Ct. Law Div. 1985) (remedy for successful *Mount Laurel* suit was to require municipality to rezone.

(Footnote continued on following page.)

proceedings, all within a defined period of time.²⁸ In Illinois, the so-called "builder's remedy" provides meaningful relief in land use cases, as it does in New Jersey and in New York.²⁹ Indeed this Court's order in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), was undoubtedly efficient in vindicating Mrs. Moore's rights.

Appellant's citation to 100 land use cases in California as support for the proposition that invalidation is impractical makes no sense whatsoever because no relief (invalidation or

(Footnote continued from preceding page.)

overzone and take whatever additional action was necessary to satisfy its fair share obligations); *Sal De Enterprises, Inc. v. Town of Islip*, 99 A.D.2d 469, 410, 420 N.Y.S.2d 176, 177 (N.Y. Supp. Ct. App. Div. 1984) (trial court should have directed that permit be issued, subject to reasonable conditions designed to minimize anticipated impact); *Shepard v. Zoning Board of Appeals of Johnstown*, 92 A.D. 993, 999, 461 N.Y.S.2d 479, 481 (N.Y. Supp. Ct. App. Div. 1983) (where use for which special permit was sought was not prohibited by the ordinance, court's issuance of permit was appropriate); *Union Oil v. City of Worthington*, 82 Oh.St.2d 263, 405 N.E.2d 277 (Ohio, 1980) (where existing zoning found unconstitutional, court could authorize property owner to proceed with proposed reasonable use if city failed to reclassify property within reasonable time); *R.W. Garrett v. City of Oklahoma City*, 594 P.2d 764, 766 (Okla. 1979) (where single-family classification was found unreasonable as applied, and appropriate new classification was fairly debatable, court enjoined enforcement and remanded for city to rezone); *Russo v. Zoning Hearing Board of Perkiomen Township*, 86 Pa. Commw. 137, 145, 484 A.2d 215, 218 (Pa. Commw. Ct. 1984) (if court determines zoning ordinance invalid, it may order the prescribed development or use as to all elements, or may approve some and remand as to the other elements); *Hylton Enterprises v. Board of Supervisors of Prince William County*, 220 Va. 435, 442, 258 S.E.2d 577, 582 (Va. 1979) (court had authority not only to determine whether denial of plat approval was arbitrary and capricious, but also to enter actual plat approval upon finding for developer).

²⁸ See, e.g., *Askew v. Gables-By-The-Sea, Inc.*, 333 So.2d 56 (Fla. Dist. Ct. App. 1976), cert. denied, 345 So.2d 420 (Fla. 1977).

²⁹ The term "builder's remedy" refers to a judicial order that authorizes development to proceed.

compensation) would be available where a regulation is valid and does not physically occupy or destroy private property, as it was in 97 of the 100 cited cases. Any difficulties that California landowners might experience in their pursuit of judicial relief would not change at all if compensation were to become an available remedy, because a remedy is available only after a plaintiff sustains its burden of proof that the regulation actually goes too far.

Amici do not by their argument suggest that a financial remedy is always inappropriate in a land use case. Indeed, it is clear, *Amici* submit, subject to established common law immunities that survived the enactment of the Ku Klux Klan Act, that money damages are appropriate to vindicate constitutional violations of all sorts, including violations of procedural and substantive due process. *Amici* suggest that the circumstances of such awards should be limited to exceptional cases; nevertheless, the remedy is clearly available. *Amici* urge this Honorable Court to embrace a rule where a regulation that is judicially declared to be overly restrictive is invalid, *void ab initio*. A court so holding, however, should make findings of fact and conclusions of law specific enough to guide the discretion of the regulatory authority when it determines whether to relax its regulations or institute eminent domain proceedings; and the court should establish a definite time for the authority to act. If the regulatory body does not act, or acts in contravention to the clear import of the court's decision, then a cause of action under 42 U.S.C. §1983 for money damages would be available.

CONCLUSION

Amici urge this Court to hold fast to its rule that a "mere regulation" does not constitute an "extreme" circumstance (that is, does not appropriate private property for a public domain and does not permanently harm private property) does not effect a "taking" in the constitutional sense. See *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862; *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455; *Hamilton Bank*, 105 S. Ct. 3108 (1985). Regulation that is judicially declared to be overly restrictive is void *ab initio*, and the appropriate and adequate remedy is invalidation. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104.

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January, 1986

APPENDIX

APPENDIX A

1. The Conservation Foundation is a non-profit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the Earth's resources. Since its founding in 1948, The Conservation Foundation has worked extensively in the fields of land use planning, urban conservation, coastal resources protection, and public land management.

2. Chesapeake Bay Foundation, Inc., is a non-profit regional membership organization founded in 1966 to promote the environmental welfare and proper management of Chesapeake Bay and its tributaries. The Foundation has over 30,000 members and accomplishes these goals through citizen representation, environmental education, and land preservation.

3. The National Center for Preservation Law was incorporated in 1978 under the laws of the State of New York as a non-profit organization devoted to architectural, historic, and neighborhood conservation. The center maintains an office in Washington, D.C., and devotes its resources to advising and providing legal services for interested state, local and private agencies and groups with respect to conservation of historic resources.

4. The National Conference of State Historic Preservation Officers (NCSHPO) is a non-profit, professional and educational organization representing the gubernatorially appointed state historic preservation officers in the 50 states, 6 U.S. territories, and the District of Columbia. The NCSHPO plays a central role in the administration of the national historic preservation program, including the development of strong local government preservation programs.

5. The National Parks and Conservation Association is a national non-profit membership organization with approximately 50,000 members and contributors nationwide. The

Association's main goal is the preservation and expansion of the National Park system. It is particularly concerned with the units of the system, but the Association has found that approximately two-thirds of the National Park system's units are adversely affected by incompatible land uses and activities outside their borders. The Association has concluded that in the long run one of the most promising solutions to these problems is the application of local land use laws, especially zoning, to prevent adverse uses and activities.

6. Preservation Action is a non-profit organization located in Washington, D.C. which actively participates in the legislative process. Preservation Action encourages the protection of historic buildings and districts, the protection of neighborhoods, and the promotion of neighborhood conservation.

AMICUS CURIAE

BRIEF

No. 84-2015

Supreme Court, U.S.

FILED

JAN 27 1986

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CLERK

In The
Supreme Court of the United States
October Term, 1985

MAC DONALD, SOMMER & FRATES, a partnership,
Appellant,

v.

THE COUNTY OF YOLO and THE CITY OF DAVIS,
Appellees.

On Appeal from the Court of Appeal of California
Third Appellate District

**BRIEF OF THE
COUNTY SUPERVISORS ASSOCIATION
OF CALIFORNIA
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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QUESTION PRESENTED

Whether a "taking" claim can be predicated on governmental action which denies one proposal for enhanced land use, leaves unchanged the pre-existing zoning and leaves unresolved the extent to which other available uses will be permitted.

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**BRIEF OF THE
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OF CALIFORNIA
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**
—o—

The County Supervisors Association of California respectfully submits this amicus curiae brief in support of appellees. Counsel for all parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of this Court.

—o—
INTEREST OF AMICUS

The County Supervisors Association of California (CSAC) is an incorporated statewide association representing California's counties. California has 58 counties

and every county except San Francisco is governed by a board composed of five elected supervisors. San Francisco has 11 supervisors. These 296 supervisors comprise CSAC's membership. One supervisor from each county serves on CSAC's board of directors.

CSAC maintains offices in Sacramento, California, and Washington, D.C., and provides legislative advocacy, litigation support, public relations and other information services to its membership. In addition, CSAC participates in litigation affecting or of interest to its membership.

As the elected local legislators charged with the responsibility of implementing California's Planning and Zoning Law and individual county zoning ordinances, CSAC's membership is interested in this case. Resolution of the issues presented here is likely to affect the implementation of state and local planning and zoning laws.

OPINION BELOW

The opinion of the Court of Appeal for the Third Appellate District, State of California, is unpublished. A copy of the opinion is contained in the Joint Appendix (JA) at 125-136.

SUMMARY OF ARGUMENT

This is the latest in a series of land-use cases to come before this Court regarding the question of what constitutes a "taking" of private property under the Fifth Amendment and the issue of what remedies are available

to an owner whose property has been "taken" by government regulation or action, short of physical invasion or damage.

We will discuss only the "taking" question because, as significant as the remedies issue is, the "taking" question must be addressed and resolved before remedies can be considered. We suggest that the procedural posture of this case renders it an unsuitable vehicle for a discussion of remedies. Appellant's claim is not ripe because it fails to satisfy the finality standard articulated in *Williamson County*. Further, appellant's claim is based on speculative and conclusionary allegations of anticipated future action and, consequently, any discussion of remedies would be essentially hypothetical.

We believe this case does offer this Court an opportunity to further refine the law regarding ripeness and finality in the context of "taking" claims. We suggest that the finality standard set forth in *Williamson County* requires more than the procedural finality of a specific application. It requires a final expression of the agency's intentions regarding the property. The court below correctly characterized the County's denial of appellant's tentative subdivision map as the rejection of only one proposed plan of development and less than a refusal to permit any development. JA at 133. In so doing, the court correctly applied the *Williamson County* ripeness criteria.

Despite the fact that this case presents itself on demurrer and, under California law, well-pleaded allegations must be accepted,¹ appellant's claim cannot be deemed ripe

¹ Except to the extent that they are contradicted by other portions of the record, see Brief for Appellees at 1-3, fn. 1, 2, 3.

because it is predicated on speculation about future government action on proposals that have not been made. Speculative allegations regarding future events should not be sufficient to satisfy the finality requirement.

There are compelling reasons why this is so. California has a comprehensive statutory scheme which establishes procedures for the review of planning matters. That scheme is intended to assist local agencies in balancing the competing considerations attendant to these matters and providing for orderly growth and development. This Court acknowledged the legitimacy of these interests in *Agin*. The county's denial of appellant's tentative subdivision map was based on factual findings consistent with this scheme. Appellant has not challenged the process or the policies that underlie it. Appellant's attempt to transform the implementation of that regulatory scheme into a purchase of appellant's property must fail.

ARGUMENT

I.

THE THRESHOLD ISSUE IS RIPENESS

Inquiry in a case of this type must begin with the question of ripeness. A claim that government action has resulted in the uncompensated taking of private property cannot be made until after the responsible agency has arrived at a final decision. As this Court has said,

[T]he economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . cannot be evaluated until the administrative agency has arrived at a final,

definitive position regarding how it will apply the regulations at issue to the particular land in question. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, No. 84-4 (June 28, 1985) slip op. 17.

Under this analysis, ripeness and finality are synonyms. Action which is not final cannot form the basis of a "taking" claim. We agree with the Solicitor General that this Court's opinion in *Williamson County* is "a fair and correct statement of the law in this area." Brief for the United States at 14. We also agree that the instant case does not present "any reason for re-examining the Court's decision there." *Id.*

Although we perceive no dispute over this standard, its application to this case is the subject of disagreement.

II.

THE CONCEPT OF FINALITY ENCOMPASSES MORE THAN THE STATUS OF A PARTICULAR DEVELOPMENT PROPOSAL

Although the county's action on appellant's tentative subdivision map is unquestionably "final" in the sense that the map has been considered and denied and there is nothing left for the county to do with it, we suggest that the *Williamson County* finality standard requires more. "Finality" encompasses two concepts. The first concerns the posture, or status, of the decision-making process itself and requires that the process run its course to completion before judicial review is sought. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 553 (1953); *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 269-271 (1944). Under this analysis, a premature claim will fail because it violates the integrity of the agency's administrative process.

The second concerns the extent to which the challenged agency action expresses the agency's ultimate intentions regarding the property. In enunciating the *Williamson County* standard, this Court said a "final, definitive position" was the condition precedent to the claim. *Williamson County*, slip op.17 (emphasis added). This clearly requires more than that the agency merely act on an individual proposal or application. If that were sufficient, a final decision is all that would be needed. A position, however, denotes more. It is "the ground or point of view adopted with reference to a particular subject." *Webster's Third New International Dictionary*. The "ground or point of view" relevant here, of course, is the agency's ultimate intention and the "particular subject" is the property. "Position," in other words, must encompass some expression of the agency's ultimate intention regarding the application of its planning and zoning laws to the property in question.

Whether that intention can be deduced from a single decision on a single application will continue to be an "essentially ad hoc" factual inquiry (*Penn Central Transportation Company v. New York City*, 438 U.S. 104,124 (1978)) which analyzes the "economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations" (*Williamson County*, slip op.17). The fact that the agency's administrative review of one proposal has run its course only permits the analysis to proceed further. The "character of the action" and the "nature and extent of the interference" with protected rights must still be evaluated. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 130.

We disagree with the suggestion of other amici that the finality standard is satisfied "when the property owner has submitted a reasonable proposal for use and that request has been denied by a final decision on that proposed use." Brief of Adirondack Park Local Government Review Board, et al. at 5. Just as it is obvious that an agency's mere contemplation of regulatory action should not entitle a property owner to judicial relief (See Brief for United States at 13), so is it obvious that the denial of a single development proposal should not, by itself, create a "taking" claim.

Not only would such a rule seemingly create a constitutional claim every time a governmental agency turned down a request for a discretionary development approval, it would stand the law of "takings" on its head. Presumably, the predicate for a "taking" claim is governmental action which restricts or regulates land use so as to deprive a property owner of some property right the owner presently enjoys. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 136. Where all that is "taken" is the ability to expand or enhance existing land use in one particular way or to realize improved profits, nothing at all is "taken." *Id.*; *Andrus v. Allard*, 444 U.S. 51,65-66 (1979).

Furthermore, if a "taking" is to be alleged, there are compelling reasons why the owner should be required to first present his case to the agency. The planning process is geared to the review of specific development proposals. Planning analysis focuses on the physical factors pertinent to growth, land use and community services. The economics of a particular development are not relevant. Planning is not intended to analyze a particular project's economic

viability. Its objective is unrelated to individual profit, loss, competition, or other conventional economic concerns. Also, analysis of the economic consequences of a particular planning decision requires information not generally available to planners.

Neither the public, the owner nor the agency will be served if the owner is not required to ever present this information to the agency. Permitting the owner to "set up" the agency by submitting a single proposal for an expanded land use and then scurrying to court upon its denial to unveil there for the first time the catastrophic economic consequences and hardships allegedly wrought by the decision will not aid sound agency decision-making. Although a planner can certainly be expected to know the Constitution as well as a policeman (see Brennan, J. dissenting, *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621, 661, fn 26), the planner should be entitled to review all the facts and evidence before he is judged to have violated the owner's Fifth Amendment rights.

The agency must be permitted this sort of review if it is to formulate a true intention regarding the property. Only after the agency has fully considered the factual basis for the claimed economic hardship should a "taking" claim be permitted to go forward.

This is not to suggest that the owner be required to endlessly submit proposal after proposal and weather denials and administrative procedures *ad infinitum*. Cali-

fornia courts have demonstrated both the ability and willingness to recognize and reverse unreasonable conduct or overreaching by government. *Los Angeles v. Decker*, 18 Cal.3d 860, 870-871 (1977), misrepresentation of facts in eminent domain action; *Birkenfield v. City of Berkeley*, 17 Cal.3d 129, 169 (1976), failure to provide efficient rent adjustment mechanism in rent control ordinance; *Billings v. California Coastal Commission*, 103 Cal.App.3d 729 (1980), unreasonable denial of development permit; *Hoshour v. County of Contra Costa*, 203 Cal.App.2d 602, 608 (1962), excessively conditioned development approval that left property useless.

Government's power to plan is well established. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The planning process will involve the denial of some uses and the approval of others. The regulation of property is permitted. *Hadacheck v. Sebastian*, 239 U.S. 394, 410-411 (1915). If regulation goes too far it will be considered a taking. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922). But the mere denial of one proposed development cannot be the equivalent of a taking. So long as reasonable uses remain, the economic impact of the denial is not sufficient to violate the constitutional guarantee. Inquiry must continue to focus, as it has, on the facts.

III.

THE RECORD HERE DOES NOT DISCLOSE A FINAL, DEFINITIVE POSITION REGARDING APPELLANT'S PROPERTY

Appellant purchased the property in question in 1971. JA 43. The record is not clear what appellant did with the property for the first four years after it was acquired,

but the inference is that it was lightly farmed and held for speculation. JA 13-17. In 1975 appellant filed an application for a subdivision map with the County. JA 49. The application proposed the construction of 159 single-family homes on 44 acres of appellant's 167-acre parcel. *Id.* See discussion in Brief for Appellees at fn. 6.

The County processed the map application in accordance with the applicable state and local procedures and ultimately denied it. JA 71. The reasons for the County's denial are set forth in the findings and decision of the board of supervisors. JA 71-80. Briefly, the board found that the proposed subdivision was inconsistent with the County's general plan (JA 73), would have improperly caused "piecemeal development" of agricultural land (*Id.*), would have rendered an adjoining farm "economically infeasible" (*Id.*), and did not adequately provide for essential services such as access and sewer (JA 74-75).

Appellant initiated this action and another action which is still pending in state court to challenge the County's denial of the map. Appellant has dismissed all claims from this action except the claim that the County's denial of the request to subdivide 44 acres of the 167-acre parcel was a "taking" of the 44 acres.²

The Court of Appeal upheld the trial court's decision sustaining the County's demurrer without leave to amend on the ground that no "taking" had been pleaded. JA 135. The Court explained its reasoning as follows:

² Appellant's claim appears to run afoul of this Court's reluctance to recognize the "taking" of one segment of a parcel. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978). See discussion in Brief for Appellees at 14-16.

[P]laintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. JA 133.

We suggest that the lower court correctly analyzed the effect of the County's action and correctly concluded that it did not reflect the kind of "final, definitive position" regarding the extent to which appellant's property would be restricted that is required before a "taking" claim can be asserted.

The County's denial of the subdivision map did not impose any restrictions on appellant's property. The property was not down-zoned or otherwise regulated. It remains available for other uses. Appellant is able to pursue any of the uses permitted by the R-1, R-2, R-3, and R-4 zones. JA 141-147. No subdivision map is required for any of these uses.

Appellant's "taking" claim is peculiar because the County's denial of the subdivision map did not "take" anything. The property remains unencumbered by restriction or regulation and, with one exception, is potentially as useful as it was when it was acquired. The one exception, of course, is that appellant is not presently able to

build 159 single-family residences on 44 acres. In this regard, appellant is in a better position than the owner of Grand Central Terminal. Like the owner of Grand Central Terminal, appellant "may continue to use the property precisely as it has been used for the past 65 years." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 136. Unlike the owner of Grand Central Terminal, whose property had been affirmatively restricted by its designation as a landmark, appellant here is also free to develop its property in numerous ways.

Although the subdivision that appellant requested would certainly have enhanced the property's value, this speculative profit is not a protected property right. *Andrus v. Allard*, 444 U.S. at 65-66; *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1944); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The denial of the subdivision map did not take anything away from the property interests that appellants possessed; it only represented a refusal to expand those interests in one particular way. Since there are many uses remaining and since the County has taken no action to foreclose those uses or to otherwise restrict appellant's use of its property, there has been no expression by the County of any intention sufficient to satisfy the *Williamson County* ripeness standard.

IV.

THIS COURT SHOULD NOT IMPUTE A NOTION OF "DEEMED RIPENESS" TO APPELLANT'S CLAIM AS A RESULT OF ITS PRESENTATION ON DEMURRER

This case is before this Court on demurrer and, according to California law, the well-pleaded allegations in the demurrer must be accepted as true for purposes of this

Court's review. *Agins v. City of Tiburon*, 447 U.S. 253, 259, fn. 6 (1980); *HFH Ltd v. Superior Court*, 15 Cal.3d 508, 511 (1975). As noted by the appellees, there are substantial inconsistencies and contradictions between the allegations in the complaint and the exhibits, judicially noticed facts, and other materials contained in the Joint Appendix. These inaccuracies are fatal to many of appellant's allegations. Besides these defects, which appellees have discussed and we will not, there are other reasons why we believe this Court should decline to "deem" this case ripe for review despite its presentation on demurrer.

Appellant's contentions that the County has denied all viable economic use of the property are speculative and are unrelated to any action that the county has taken. For example, appellant's complaint contains a seven-page listing of other land uses permitted under the Yolo County zoning ordinance and a brief explanation of why each of these uses are purportedly "not suitable." JA 52-58. These allegations are wholly ineffective to establish the claim appellant purports to make. First, Appellant's property is not zoned for these uses. It is zoned residential. JA 141-147. Second, assuming *arguendo* the accuracy of the zoning reference, neither the County nor the City has found appellant's property to be "not suitable" for the uses enumerated. The complaint does not allege that they have. The allegation of unsuitability is of appellant's own creation. It is the weakest form of conclusionary pleading.

An owner should not be permitted to establish a "taking" claim by listing available land uses and summarily disposing of them with the self-serving conclusion that they are "not suitable" for his land. Appellant has never

sought any of these uses and has no basis to assume that they would be denied.

This illustrates again the importance of requiring a "final, definitive position" of the agency before permitting a "taking" claim to proceed. To hold allegations of this type sufficient to state a "taking" claim would be tantamount to letting an owner "take" its own property. Under such a pleading standard a *prima facie* "taking" claim could be established if the owner simply enumerated the available land uses and explained why he believed they were not suitable. A "taking" would be established without any agency action at all. This would be contrary to this Court's holding in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). It would be contrary to the standard of pleading required under California law. *HFH, Ltd. v. Superior Court*, *supra*; *Serrano v. Priest*, 5 Cal.3d 584,591 (1971). It would be extremely bad law.

Appellant has submitted a single plan for a high-density development which has been denied. Appellant has not alleged that a lower-density residential development would be economically infeasible. Appellant has not proposed such a development. Appellant has not sought a variance, conditional use permit, rezoning, general plan amendment or other discretionary permit. Appellant has not attempted to resolve any of the concerns which led to the denial of its map application. Appellant has not proposed any of the uses which appellant lists and rejects in the complaint. Appellant cannot contend that the County has denied all use of the property, unless and until the County does.

In this regard, it should be remembered that the prior owners of appellant's property sold one of the prop-

erty's valuable attributes, its topsoil. JA 45. That attribute had presumably contributed toward making agriculture profitable. It can be assumed that appellant's predecessors in interest obtained fair and full compensation for the topsoil because, although the sale was allegedly made "under express threat of condemnation," (*Id.*) we can assume appellant's predecessor would have litigated the sale had the price not been agreeable. We can also assume that the price appellants paid for the land reflected the loss in value occasioned by this prior sale. Necessarily, appellant's reasonable investment-backed expectations must also reflect this reduction in value. The owner of the property having been paid once, we are unaware of any resulting duty on government to adjust its zoning or general plan to further compensate appellant by permitting all the uses appellant wants.

V.

CALIFORNIA HAS A STATUTORY PROGRAM PROVIDING FOR BALANCED AND CONTROLLED GROWTH WHICH REFLECTS CERTAIN POLICY CHOICES MADE BY THE LEGISLATURE. THE COUNTY'S ADHERENCE TO THIS SCHEME DID NOT EFFECT A TAKING OF APPELLANT'S PROPERTY.

A. California's Planning and Zoning Law Represents An Integrated System of Local Land Use Planning

This Court has acknowledged local government's authority to enact land-use controls to enhance the quality of life. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 129. In this section of the brief we will summarize the local planning process in California as established by legislative and judicial action.

A county's power to plan and zone flows from the police power. *Miller v. Board of Public Works*, 195 Cal. 477 (1925); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The land-use planning power manifests itself in three ways in California: state legislation, local legislation, and direct action by the People through the initiative and referendum. See *Arnel Development Company v. Costa Mesa*, 28 Cal.3d 511 (1980); *Associated Home Builders v. City of Livermore*, 18 Cal.3d 582 (1976).

The state legislation is subsumed under the title, "Planning and Zoning Law" and is contained in the California Government Code at Sections 65000, *et seq.*³ Counties derive their land-use planning authority from this and from Article XI Section 7 of the California Constitution, which provides that a county may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.

The Planning and Zoning Law provides that "each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." Section 65300. The duty to adopt a general plan is mandatory and may be judicially enforced. *Camp v. Board of Supervisors*, 123 Cal.App.3d 334,348 (1981).

The Planning and Zoning Law specifies certain elements which must be included in the general plan. These "mandatory" elements must designate the distribution and location of all land uses; the location of existing and

³ Unless otherwise indicated, all section references are to the Government Code.

proposed roads, transportation routes and public utilities; the distribution of housing; the conservation, development and utilization of natural resources; the allocation and preservation of open space for wildlife preservation, outdoor recreation and resource management; the identification and appraisal of noise problems; and the protection of the community. Section 65302.

The general plan may include such additional elements as in the judgment of the city or county relate to the physical development of the city or county. Section 65303.

The adoption of the general plan and the individual elements thereof is a legislative act reviewable by mandamus. Section 65301.5; *Karlson v. City of Camarillo*, 100 Cal.App.3d 789 (1980). Since the wisdom of the plan is within the legislative and not the judicial sphere, courts may not probe the merits of the plan. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110,118 (1973). The plan may be adopted in any format deemed appropriate by the agency's legislative body. Section 65301. However, the statutorily prescribed procedures for its adoption must be followed. *Selby Realty Co., supra*.

After adoption, the general plan becomes the "constitution for all future development." *Friends of "B" Street v. City of Hayward*, 106 Cal.App.3d 988,997 (1980); *O'Loane v. O'Rourke*, 231 Cal.App.2d 774,782 (1965). It is at the top of the hierarchy of the planning process. *The Neighborhood Action Group v. County of Calaveras*, 156 Cal.App.3d 1176,1184 (1984). The plan and its elements constitute an integrated, internally consistent and compatible statement of policies. Section 65300.5. No single element is preeminent. All elements have equal

status and there should be a "thread of logic" and continuity reflected throughout the plan. The various objectives and policies represented in the plan must be balanced in order to ensure the sensible and orderly development of the community. *Sierra Club v. Board of Supervisors*, 126 Cal.App.3d 698,704 (1981); *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal.App.3d 893,915-916 (1980).

The plan is, by its very nature, tentative and must be permitted to evolve with the community. *Selby Realty Company v. City of San Buenaventura*, 10 Cal.3d 110, 118 (1973). To this end the plan may be amended, but no more than four times in any one calendar year. Section 65358. Prior to amendment (or adoption) the county or city must refer the proposed action to any adjoining city or county "which may be significantly affected by the proposed action." Section 65352.

Although the local planning and zoning process involves different discretionary approvals, depending on the nature of the project or proposal, this case involves the denial of a subdivision map and, for that reason, this discussion will be limited to the subdivision map review process.

Subdivisions are governed by the Subdivision Map Act. Section 66410 *et seq.* With certain exceptions, the division of property into five or more parcels for purposes of sale, lease or financing may only be accomplished by means of a subdivision map approved by the county or city where the property is located. Sections 66424 and 66452, *et seq.* Regulation of the "design" and "improvement" of land divisions is vested in counties by the Subdivision Map Act. Section 66411.

Under the Subdivision Map Act, a property owner desiring to divide property must first submit a "tentative" subdivision map to the county for approval. Section 66452 *et seq.* The map must be expeditiously processed under prescribed time limits. Sections 66452-66452.4. Review procedures typically involve preliminary review by planning department staff, followed by review by the county planning commission at a public meeting, where evidence is received and a record made. Local agencies within three miles of the proposed subdivision may make recommendations concerning the proposed land division. Section 66453. These recommendations must be "taken into consideration" by the county during the review of the map. *Id.* Prior to taking action on the tentative map the county must provide copies of any written planning staff reports to the subdivider. Section 66452.3.

Final review of the map is before the county's legislative body which, in California, is the board of supervisors. The board's review is performed at a public meeting and a record is made. The board must render its decision and adopt written findings within ten days after the conclusion of the hearing. Section 66452.5.

The board of supervisors is required to adopt written findings explaining its decision in order to bridge the analytic gap between the raw evidence and ultimate decision or order. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506,514 (1974).

The Planning and Zoning Law limits the board's discretion to approve a subdivision map. Section 66473.5 provides, in relevant part, as follows:

No local agency shall approve a tentative map, . . . unless the legislative body shall find that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan

A proposed subdivision shall be consistent with a general plan . . . only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in such a plan.

Section 66474 provides, in pertinent part, as follows:

A legislative body of a city or county shall deny approval of a tentative map . . . if it makes any of the following findings:

- a) That the proposed map is not consistent with the . . . general . . . plan[]
- b) That the design or improvement of the proposed subdivision is not consistent with the . . . general . . . plan[].
- c) That the site is not physically suitable for the type of development.
- d) That the site is not physically suitable for the proposed density of development.

. . . .

If any of these findings is made, denial of the map is mandatory. The board has no discretion to act otherwise. Section 14; *Camp v. Board of Supervisors*, 123 Cal.App.3d 334,348 (1981); 64 Ops.Atty.Gen. 328,335. "[T]he denial of map approval is not only authorized, but *required*, for a failure to fulfill design conditions authorized by local ordinance." *Soderling v. City of Santa Monica*, 142 Cal. App.3d 501,507 (1983). (Emphasis in original)

Not only is the board required to deny the map if it makes any of the findings described in Section 66474, the California courts have further held that the board is prohibited from approving a map unless the board affirmatively finds that the proposed subdivision is "consistent with the applicable general plan." *Woodland Hills Residents Association, Inc. v. City Council*, 23 Cal.3d 917,936 (1979); *Woodland Hills Residents Association, Inc. v. City Council*, 44 Cal.App.3d 825,838 (1975).

In addition to the provisions of the Planning and Zoning Law are the requirements of the California Environmental Quality Act. Public Resources Code Section 21000 *et seq.* It requires agencies to consider the environmental consequences of their actions. Public Resources Code Section 21001; *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247,271 (1972). If any aspect of the proposed project may cause a significant effect on the environment, an environmental impact report is required (14 Cal. Admin. Code Section 15063). The report must be considered by the board of supervisors. A project with significant adverse impacts cannot be approved unless the board makes specific written findings to justify approval. (14 Cal. Admin. Code Section 15091).

B. The County's Denial Of The Map Reflected Legitimate Policy Considerations Consistent With The Legitimate Regulation Of Land Use

Appellant's project presented difficult planning considerations for two reasons. First, it proposed the conversion of existing open space agricultural land into high-density residential development. Second, it was on the "urban fringe" adjacent to the developing boundary of the City of Davis.

The County's policy of directing high-density development towards urban areas is consistent with state policies which encourage the preservation of agricultural lands. In 1974 the State Legislature enacted a statute to articulate state policy with regard to the preservation of prime agricultural lands. Section 56377, formerly 54790.2. The section provides, in pertinent part, that "[d]evelopment or use of land for other than open space uses shall be guided away from existing prime agricultural lands and open space use toward areas containing nonprime agricultural lands." Other statutes reinforce the strength of this policy. Sections 65560-65570. This policy has been recognized and approved by the California courts. *Gisler v. County of Madera*, 38 Cal.App.3d 303,307 (1974). Its legitimacy was acknowledged by this Court in *Agins v. City of Tiburon*, 447 U.S. 255,261 (1980).

The "urban fringe" has been an area of historically difficult planning. To better facilitate orderly growth and provide for coordination of land-use planning between cities and counties, the California Legislature enacted legislation in 1963 to create Local Agency Formation Commissions (LAFCO's). "Among the purposes of a Local Agency Formation Commission are the discouragement of urban sprawl and the encouragement of the orderly formation and development of local governmental agencies based upon local conditions and circumstances." Section 56301.

The LAFCO legislation was the state's first and most direct attempt to convert chaotic planning on the urban fringe to a rational and logical process. In recognition of the political realities of city-county relationships, the LAFCO legislation recognized that solutions to

the problems of urban sprawl required the equal participation of cities and counties. LAFCO's represent a unique California experiment in regulating and rationalizing growth and development in the urban fringe through control over the growth and development of all local agencies within a county.

Section 56425 requires that each county's LAFCO "develop and determine the sphere of influence of each local governmental agency within the county." These "spheres of influence" are generally regarded as key tools for managing growth at the urban fringe, where developing city lands face relatively less developed, unincorporated county lands. See generally, Eels, "LAFCO Spheres of Influence: Effective Planning for the Urban Fringe?" (Institute of Governmental Studies, U.C. Berkeley, 1978).

So critical to the overall planning process are these "fringe" areas that the General Plan Guidelines published by the State's Office of Planning and Research state:

Since issues do not respect political boundaries, the law provides for extraterritorial planning. Extraterritorial planning is a means by which a local government can formally indicate to its neighbors its concern for the future of the lands under its neighbors' jurisdiction. Cooperative extraterritorial planning can be used to guide the orderly and efficient extension of facilities and services, ensure the preservation of open space, agricultural lands, and resource conservation areas, and establish consistent development standards in the plans of adjacent jurisdictions. At 14.

California's courts have recognized the need for cooperative action in this regard.

[U]nlike the situation in the past, most municipalities today are neither isolated nor wholly independent from neighboring entities and, consequently, land-use decisions by one local unit affect the needs and resources of the entire region. *Dateline Builders, Inc. v. City of Santa Rosa*, 146 Cal.App.3d 520,531 (1983). (Emphasis in original)

The County's desire to preserve its open space agricultural lands and the cooperation demonstrated by the City and the County were encouraged by and consistent with these policies.

C. A Taking Claim Cannot Be Predicated On The Kind Of Regulation Manifested By The County's Denial Of Appellant's Map

The State Planning and Zoning Law compels counties to address, consider and resolve the multitude of competing policy considerations relevant to community growth and development. The Planning and Zoning Law does not specify how the considerations should be balanced or what the result should be in any particular case. It mandates full consideration and it incorporates certain policies to guide review.

Local agencies must look not only to the welfare of the people within their boundaries but to the welfare of all the people in the affected communities and surrounding regions. Interjurisdictional cooperation and joint planning are encouraged; isolationism is not.

In order to uphold appellant's claim, this Court must effectively invalidate the policy decisions of the City and County regarding where their boundaries should be, how

they should allocate limited resources,⁴ and how necessary municipal services should be extended.

Those regulatory decisions have never been found to have "taken" property. *Village of Belle Terre v. Boraas*, 416 U.S. 1,8 (1974); *Dandridge v. Williams*, 397 U.S. 471,484 (1970); *Hadacheck v. Sebastian*, *supra*. We urge this Court to reaffirm the authority of local government to make these policy choices.

VI.

CONCLUSION

Appellant has failed to establish a "taking" claim. The challenged action is a decision on a single-development proposal that does not reflect a final, definite position of the County regarding appellant's property. The denial of appellant's tentative subdivision map imposed no affirmative restrictions on the land and left appellant free to pursue numerous other land uses. Appellant's allegations to the contrary are speculative and based upon appellant's own conclusions unsupported by any County action. Despite the presentation of this case on demurrer, this Court

⁴ Thirty-five of California's counties have populations under 100,000. 412 of the state's 441 cities have populations under 100,000. Yet these small, frequently poor and often rural communities are charged with the stewardship of some of the states most precious natural and historic resources. *California County Fact Book, 1985* (County Supervisors Association of California); "Cities of California", 1983-84 Annual Report of the State Controller.

should not deem appellant's claim ripe because of the speculative and conclusionary nature of appellant's allegations.

The County reviewed the map pursuant to a comprehensive body of state law that prescribes the procedures for review and reflects certain policy choices made by the State Legislature. Operating within that framework, local agencies are free to regulate land use so as to promote the community goals reflected in their own general plan. This form of regulation is permissible and cannot, of itself, serve as the basis for a "taking" claim.

We request that this Court affirm the decision of the Court of Appeal.

Respectfully submitted,

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APPENDIX

App. 1

YOLO COUNTY ABSTRACT

Source: California County Fact Book, 1985

Published by the
County Supervisors Association of California

Yolo County is a small, rural, agricultural county in northern California. The county ranks 41 out of California's 58 counties in size and 29 in population. It is comprised of 1,034 square miles and has a population of approximately 120,000 people. It has three incorporated cities: Davis, Winters and Woodland. Of the county's total population, approximately 75,000 people live in the cities. In the past five years the county's total population has increased by approximately 6,000 people. This increase has represented a growth rate of approximately 1.5% per year. Between 1983 and 1985 there was a net decline in the population in the unincorporated area of the county. This decline is the result of the annexation of land by the cities.

Yolo County ranks 22nd out of California's 58 counties in total dollar value of agricultural production. The value in 1983 of Yolo County's agricultural production was \$162 million, exclusive of timber products. Principal crops are corn, safflower, tomatoes and wheat.

Ninety-one percent of its property is privately owned, as contrasted with a statewide average of 51%.

We have lodged with the Clerk a map depicting California's counties with Yolo County highlighted for reference. We have also lodged with the Clerk a data summary sheet prepared by the Sacramento Area Council of Governments showing housing and population figures for the County and City. Copies have been supplied to all counsel.

AMICUS CURIAE

BRIEF

JAN 27 1986

JOSEPH F. SPANIOL, JR.
CLERK

(19)
No. 84-2015

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

MAC DONALD, SOMMER & FRATES,
a partnership,
Appellant,

v.

THE COUNTY OF YOLO AND THE CITY OF DAVIS,
Appellees.

On Appeal from the Court of Appeal of
California

BRIEF OF AMICUS CURIAE,
CITY OF MOUNTAIN VIEW, CALIFORNIA, AND
OTHER JOINING CITIES OF CALIFORNIA IN
SUPPORT OF APPELLEE

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STATEMENT OF THE CASE

Amicus curiae adopt in full the state-
ment of the case made by Appellee County
of Yolo and the City of Davis.

INTEREST OF AMICI CURIAE

A decision which favors money judgments for claims in inverse condemnation based on the regulatory activity of a governmental agency has a significant impact upon any city attempting to regulate the use of land. Imaginative land use planning techniques have become a necessary regulatory tool in the implementation and control of growth in a modern, complex society. Though not every decision has been perfect -- some may even unintentionally exceed bounds of discretion -- cities need the flexibility to experiment in land use without the threat of monetary reprisal where regulation has unintentionally gone too far.

The City of Mountain View and all those joining California cities (see

Appendix A) are charged with the responsibility of implementing the planning and zoning laws of the state of California. These cities are in the forefront of land use regulation. Because land use issues are complex, local legislators have traditionally been accorded wide discretion in reaching difficult land use decisions. Sometimes those decisions result in the rejection of a developer's specific proposal, but lending the sword of inverse condemnation to developers whose projects are rejected places the concept of land use regulation on its head and effectively removes discretion from locally elected officials. There is no incentive in being innovative in the land use planning area if each new innovation risks losing substantial sums to successful inverse litigants.

Amici curiae are, in most instances, the locus and focal point of land use disputes and therefore have a compelling interest in the outcome of this litigation.

ARGUMENT

Amici curiae have reviewed various briefs filed in this case and have found the arguments and point of view set forth in Appellee's brief in this matter compelling and convincing. Rather than duplicate those arguments amici wish to express to this Court the profound concern they have with respect to the resolution of this matter in a fashion similar to that sought by Appellee. Without such a resolution, effective land use regulation will take a giant step backwards.

CONCLUSION

The need to create a balance, by regulation, between inevitable growth and the needs of society for a decent, safe environment in which to live has generated this litigation. Resolution of this litigation by the adoption of a comprehensive inverse condemnation remedy for damages, especially based on the facts in this case, eliminates the possibility of effectively creating that balance.

For all the reasons set forth, amici respectfully urge this Court to affirm the decision of dismissal of the court below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

In the Supreme Court

OF THE

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OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, A PARTNERSHIP,
Appellant,

VS.

THE COUNTY OF YOLO AND THE CITY OF DAVIS,
Appellees.

On Appeal from the Third District Court of Appeal
of the State of California

Amici Curiae Brief of State of California ex rel.
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New York, Pennsylvania, South Carolina, Texas, Utah, Vermont
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Supreme Court, U.S.

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QUESTIONS PRESENTED

1. Has there been a taking of property violative of the United States Constitution where the government action complained of prevented only a proposed new use and did not defeat or in any way restrict existing property rights?

2. Where a land use regulatory measure enacted pursuant to the police power comes into conflict with property rights protected by the Fifth and Fourteenth Amendments, does a judicial decree remanding the matter to the regulatory body for corrective action constitute the appropriate remedy or does the Constitution compel forced payment of "interim damages"?

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No. 84-2015

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

MACDONALD, SOMMER & FRATES, A PARTNERSHIP,
Appellant,

VS.

THE COUNTY OF YOLO AND THE CITY OF DAVIS,
Appellees.

**On Appeal from the Third District Court of Appeal
of the State of California**

**Amici Curiae Brief of State of California ex rel.
John K. Van de Kamp, Attorney General, and the
California Coastal Commission, the States of Alaska, Delaware,
Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine,
Maryland, Massachusetts, Michigan, Minnesota, Missouri,
New York, Pennsylvania, South Carolina, Texas, Utah, Vermont,
Washington, Wisconsin and Wyoming, and the
Territories of American Samoa, Guam and the Virgin Islands**

INTEREST OF AMICI

Amici respectfully file this brief in support of appellees County of Yolo and City of Davis pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States. Amici have been granted leave, pursuant to Rule 33.4, to file a brief in excess of the page limits otherwise applicable.

The 28 states and territories which have joined as amici in this case, together with their political subdivisions, exercise regulatory power over the proposed use of land and water resources within their respective jurisdictions. Amici are charged with the delicate responsibility of balancing demands for growth and development against health and safety concerns and the need to preserve finite natural resources located within their borders. The affected resources run the gamut from wilderness areas to urban communities, coastal wetlands to rural farmlands. Proposed development projects that amici review on a regular basis are similarly multifaceted: residential subdivisions, commercial centers, recreational developments and mineral mining projects are merely illustrative. The power of state, regional and local governments to control untoward development has been recognized for generations. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

California law confers upon its Attorney General supervisory power to oversee enforcement of California's environmental statutes, including its comprehensive Planning and Zoning Law. Cal. Gov. Code §§ 12600; 65000 et seq. (West 1980 and 1983). The manner in which California cities and counties implement their land use responsibilities under state law is critical in insuring the continuing economic and environmental well-being of the state as a whole.

The issues presented by this case are of fundamental importance to California and each of the other states and territories joining in this brief. A decision holding that the actions taken by appellees herein have violated the U.S. Constitution would seriously impair the ability of these states and their political subdivisions to plan responsibly for future growth. A decision holding that federal law mandates imposition of a damages remedy against local and state governments whenever they are found to

have incorrectly denied a land use permit would endanger the fiscal health of many of these entities.

SUMMARY OF ARGUMENT

1. No property interest existed which could have been impaired by any actions of appellees. Appellees have not prohibited or restricted any existing use of the property in question. Under California law, no "right" to a subdivision ever existed, thus no property interest was "taken."

The Constitution protects one against takings of property but does not guarantee that all property will have profitable uses. The allegation that property is unprofitable in its present state therefore does not give one a right to either a new use or to compensation by the government. Even assuming that some existing property interests of appellants have been affected, under the factors set forth by this Court the court below correctly found that no taking had occurred.

2. The remedies issue in this case is relatively narrow: is forced purchase of a retroactive property interest, i.e., "interim damages," a constitutionally-compelled remedy to cure a "regulatory taking"? Traditionally, courts confronted with this issue have found equitable relief rather than damages to be the appropriate remedy. Consistent with precedent, the preferable and effective course in most cases where such a regulatory taking exists is to remand the matter to the affected administrative or legislative body for corrective action under the continuing supervision of the trial court. This remedy properly leaves to the agency the decision to choose between acquisition of the property through exercise of the condemnation power, invalidation of the offending measure or other effective corrective action.

Compelled payment of interim damages in such cases, on the other hand, would have several unfortunate consequences. First, imposition of a damages remedy would raise serious separation of powers questions by forcing the judiciary to make de facto planning and budgetary decisions that have traditionally been left to other branches of government. Second, requiring money damages in the case of a regulatory taking carries the risk of fiscal

chaos for state and local governments. Third, such a holding would have a major chilling effect on the land use planning process. Fourth, creation of an interim damages remedy would generate substantial additional litigation for federal and state courts alike, involving technical and speculative issues with which the judiciary is unequipped to deal. Finally, recent decisions by this Court involving constitutional torts and 42 U.S.C. section 1983 suggest that imposition of an interim damages remedy is inappropriate in the planning and zoning context.

ARGUMENT

I

THERE HAS BEEN NO "TAKING" OF APPELLANT'S PROPERTY, AS APPELLANT STILL HAS EVERYTHING IT PURCHASED AND COMPLAINS ONLY OF AN INABILITY TO EXPAND ITS RIGHTS

Appellant in this case bought land in 1971, which was then being farmed. The land in question has been farmed ever since. No regulation has been passed by any governmental entity to restrict farming, nor is there any complaint about an uncompensated physical invasion or public use of the property. Appellant complains only that the appellee governments have not provided assistance and permits for an intensive residential development outside city limits and intruding into an agriculturally productive area. To say that appellant has had its property "taken" strains language and law beyond the breaking point.¹

¹ Because the issue is being thoroughly briefed by others, we will not discuss the "ripeness" issue in detail. This should not, however, be taken as an indication that these *amici* believe that ripeness exists. Indeed, of the recent cases examining this question in the "taking" context, this case most clearly fails the test set out by this Court just last term in *Williamson County Regional Planning Commission v. Hamilton Bank*, ___ U.S. ___, 105 S.Ct. 3108 (1985) hereinafter "*Williamson County*".

Appellant herein has submitted a grand total of one application for a particular development of land which had never previously received a development approval. Before applying for any other possible develop-

A. No Property Interest Which Ever Existed Under California Law Has Been "Taken"

This Court has decided several recent cases in which plaintiffs have challenged regulations for allegedly violating the Constitution by "taking" property rights. See, e.g., *Williamson County*, 105 S.Ct. 3108 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) ("*San Diego Gas & Electric*"); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) ("*Penn Central*").² In these cases, the Court has acknowledged

ment—or even attempting to explore the possibility—appellant filed this suit. The Court of Appeal explicitly held as a matter of California law that "the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development." (J.A. 133.) *Williamson County* could hardly be clearer that a taking claim is not ripe under these circumstances, regardless of allegations or even testimony about what the local government would be likely to allow.

The Solicitor General's discussion of this issue is perplexing. After saying that he agrees with the ripeness analysis contained in *Williamson County* (Brief for the United States as Amicus Curiae at 14), he suggests that the Court could decide to hear the case on the basis of "deemed ripeness," a concept for which no authority whatsoever is cited. (*Id.* at 15.) This notion is entirely contrary to the holding of *Williamson County* (in which a jury had actually found a taking), which may be why the Solicitor finds it necessary to say "it may be that this Court is not presented with a situation that would require it to apply the rule of *Williamson County* to the facts here." *Id.* at 14. Applying the rule would clearly require dismissal of this appeal.

² Amici use the term "taking" figuratively to describe a land use restriction found to deny a landowner substantially all economic use of his or her property. Last term this Court indicated its ambivalence over whether to characterize such a measure as a violation of the Taking Clause or, alternatively, of substantive due process guarantees. *Williamson County*, 105 S.Ct. 3108, 3116-3124. Amici take no position on this issue, but suggest that it leaves unresolved the underlying question of what is the appropriate remedy to cure the constitutional violation, however characterized. See part II, *infra*. The latter question must be resolved irrespective of how the Court frames the nature of the constitutional infringement.

that the question is not susceptible to an easy, formulaic answer, and has required "essentially ad hoc, factual inquiries." *Penn Central*, *supra*, 438 U.S. at 124. As true as that is, one bright line rule exists: a property right must exist before it can be taken. Because no existing property right has even allegedly been disturbed, a taking cannot be found in this case.

This Court has repeatedly held that the property rights protected by the Constitution must have their source elsewhere. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Texaco, Inc. v. Short*, 454 U.S. 516, 526-27 (1982). Since no source other than state law has been suggested for the so-called property rights at issue here, if they do not exist under California law then they simply have not been taken.

What property rights, then, are claimed to have been taken? There has been no physical invasion of the land, nor any restriction on the use of the land which existed when it was purchased by appellant, nor any restriction on the ability of appellant to sell the land as it was purchased. Thus, the property right claimed must be a "right" to change the status quo. This right did not and does not exist.

1. California Law Does Not Recognize A "Right" to Subdivide Prior To Government Approval

The right to subdivide land has been governed in California for many years by the provisions of the Subdivision Map Act.³ Cal. Gov. Code § 66410 et seq. (West 1983). The act has many purposes, including the prevention of fraud and protection of the public fisc. See, e.g., *Pratt v. Adams*, 229 Cal.App.2d 602, 606, 40 Cal.Rptr. 505, 508 (1964). The statute vests the local government with broad discretion to determine whether to approve or deny the application. Cal. Gov. Code §§ 66473-74 (West 1985); 59 Cal.Ops.Atty.Gen. 129 (1976); and 58 Cal.Ops.Atty.Gen. 21

³ Comprehensive governmental regulation of proposed land divisions has existed in California since at least 1943. See Cal. Stats. 1943, ch. 128, p. 865. This Court has recognized that taking claims may not be stated against regulations which pre-date the alleged property interest. *United States v. Rodgers*, 461 U.S. 677, 697 n.24 (1983).

(1975). Since in this case not even a tentative map was ever approved, there could be no possible "right" to subdivide.⁴

2. No Property Right Existed To The Type Of Access Desired By Appellant

Appellant's argument that appellees' actions regarding access to the property amount to a taking are similarly flawed. No such right of access has ever existed.

While artfully and ambiguously worded, the complaint at issue, in contravention of the Brief of Appellant,⁵ does not allege that there is no access to the property: "City and County have intentionally deprived Plaintiff of *any access* to the Property *suitable for residential development* . . ." J.A. at 62 (emphasis added). This, of course, means that the claimed denial of access adds nothing to the claimed right to subdivide. If there is no Constitutional right to a particular development, surely there is no Constitutional right to install the accessways for such development.⁶ No case of which we are aware is to the contrary. For example, the principal case relied upon by appellant, *Jones v. People ex rel. Dept. of Transportation*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978), involved the destruction of previously available access by an agreement between the local

⁴ The fact that the land in question may have been zoned so that a subdivision *could* have been approved also cannot lead to a property right prior to the actual approval. California law is entirely clear that the purchase of land does not create any right to the continuation of the zoning which existed when the property was purchased. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 109 Cal.Rptr. 799 (1973); *Anderson v. City Council*, 229 Cal.App.2d 79, 40 Cal. Rptr. 41 (1964). The same is true of general plans. *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, cert. denied, 425 U.S. 904 (1976). This identical principle was announced by this Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁵ "The foregoing actions of Davis and Yolo County deprive the Property of *all* access." Brief of Appellant at 16 (emphasis added).

⁶ Indeed, the record makes clear that approval of the subdivision with the single accessway proposed by appellant would have violated local health and safety standards. J.A. 73-74, 77.

government and the California Department of Transportation, which planned to put a freeway in the vicinity. In the instant case, existing access has not been terminated, and the refusal to permit the creation of new demands on existing city streets was based not on a proposal to take appellant's property for public use, but in order to control the spread of urban uses outside of city limits.

B. Appellant Has No Constitutionally-Cognizable Right to a Profitable Use

Appellant makes much of allegations in the complaint regarding the suitability of the property in question for farming, arguing that the government is forbidden by the Constitution from imposing or retaining any restriction on land use which will prevent its owner from making a profit. Where an existing profitable use exists, it can be argued that a new regulation prohibiting that use could be a "taking." While such is not always the case even in that situation (see, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887)), the notion that an economically viable use is guaranteed by the Constitution is completely unsupportable in the case of desired *new* uses. The Constitution protects against takings; it does not assure profits.⁷

Application of the economic viability test to the regulation of raw land would lead to preposterous results. For example, is the owner of hillside property in an area with a recent history of serious landslides constitutionally entitled to subdivide regardless of the danger simply because no other economically viable uses exist? Were this test to be accepted, development of, e.g., arid land, unsuitable for agriculture and far from existing cities, requiring massive investment to provide basic urban services, could not be subjected to even the most traditional restrictions on density, height, etc., because compliance with them would pre-

⁷ In *Andrus v. Allard*, 444 U.S. 51, 66 (1979), the Court noted that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." See also *Williamson County*, 105 S.Ct. at 3229-30 n.13; *MacLeod v. Santa Clara County*, 749 F.2d 541 (9th Cir.), cert. denied, 105 S.Ct. 2705 (1985); *Mosca v. United States*, 417 F.2d 1382 (Ct.Cl.), cert. denied 399 U.S. 911 (1970).

clude profitable development given the tremendous infrastructure costs. Applied to undeveloped property, the "economic viability test" would thus prevent regulation on the land most ill-suited for development. Surely nothing in the Constitution requires such a result.⁸

C. Even Assuming That Plaintiff Had A Property Interest Which Has Been Affected By Defendants' Actions, There Has Been No Taking

Assuming, *arguendo*, that plaintiff has a property interest in the denial of its proposed subdivision, plaintiff still has not met the standard of a taking as set forth by this Court. (See, e.g., *Penn Central supra*, 438 U.S. 104; *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862 (1984). Although the cases vary somewhat in describing the factors to be considered, one common formulation is: "... the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Ruckelshaus*, 104 S.Ct. at 2875. Looking at each of these factors demonstrates that appellant has not suffered a taking.

1. The "Character Of The Action" Does Not Support A Taking Claim

In discussing this factor, this Court has noted that "(a) 'taking' may be more readily found when the interference with property can be characterized as a physical invasion by government" and that in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. ..." *Penn Central*, 438 U.S. at 124-25.

In this case, of course, there has been no physical occupation of the property. Instead, the alleged "taking" is merely the refusal for the time being to allow conversion of the appellant's land to a

⁸ Nor does the Constitution require that a city must extend urban services outside its current border simply to facilitate new development.

specific, relatively intense urban use. The government's motives are set forth in the record: the prevention of poorly designed and ill-served urban sprawl with its attendant environmental harm and destruction of agricultural land.⁹ This court has specifically noted the legitimacy of such objectives. *Agins v. City of Tiburon, supra*, 447 U.S. 255, 261.¹⁰

The preservation of agricultural land from the effects of sprawl is a serious national problem. The United States Department of Agriculture discussed the problem in its 1981 Yearbook of Agriculture, *Will There Be Enough Food?*¹¹ Noting that three million

⁹ The Solicitor General's brief contains an excellent summation of the numerous reasons leading to denial of the subdivision map. Brief for the United States as Amicus Curiae at 3-6.

¹⁰ Appellant asserts that "[b]y 1975 . . . Davis had adopted an anti-growth policy." Brief of Appellant at 5. Not only is California the largest state in the nation by over eight million people, but it is still the eighth fastest growing state even on a percentage basis, having added over three million to its population as determined by the Census Bureau between 1980 and 1985. Over this period, California's population grew 11.4 percent, while the nation as a whole grew 5.4 percent. (New York Times, December 30, 1985, p. 11, col. 1.) Davis, with its purported "anti-growth" policy, saw its population increase from 23,488 in 1970 to 31,831 in 1975 to 36,640 in the 1980 census. C.T. 1002. According to official estimates, its population on January 1, 1985, had reached 40,500, a 4.38 percent increase over the previous year. Sacramento Area Council of Governments, 1985 Population Estimates for the SACOG Region, (May 1985). In the decade from 1975 through 1985, the total number of housing units in Davis increased 31.3 per cent. SACOG *Data Summaries*, Vol. 15, No. 17 (June 1985). If Davis has an anti-growth policy, it has not been terribly effective.

¹¹ "Today we recognize land as a national resource, whose ownership carries both rights and responsibilities. The responsibilities are not yet as well defined legally as the rights, and therein lies the rub. Will we have adequate land to produce the food and fiber we need in the 21st century if land development continues unabated?"

"Suburban housing, energy, transportation and other large land users are bidding for agricultural land at a level that often excludes agricultural interests from holding on to it. Land moved out of agriculture is rarely returned to crop production. It is frequently our best farm land.

acres of agricultural land are converted to urban uses every year, the Yearbook quotes a 1980 report by the Committee on Banking, Finance and Urban Affairs of the United States House of Representatives:

"Suburban and exurban sprawl is splattering industrial, retail, and residential development across the countryside. It is both a city and a farm problem. It is sapping the vitality of large and small cities, devouring farmland at a dangerous rate, and wasting energy at every turn. It makes mass transit unfeasible in many areas, makes commuters excessively reliant on autos that have to travel greater distances, leaves in-city facilities underused, and requires duplication of these facilities as existing communities are abandoned." *Id.* at 154.¹²

As a result of such concerns, in 1981 Congress enacted the Farmland Protection Policy Act, 7 U.S.C. section 4201.

While California, in becoming the most populous state, has lost nearly two million acres of its own agricultural land,¹³ agriculture remains the state's most important industry.¹⁴ In recent years California has adopted a number of measures designed to make it possible for more farmers to remain in business and thus to

Land brought into agriculture is usually more difficult and costly to farm, and less productive than the acreage being lost." *Will There Be Enough Food?* at 131.

¹² As this statement recognizes, urban sprawl, i.e., the premature conversion of rural land to urban uses, adversely affects much more than just agricultural lands. It is caused in part by the fact that developers can purchase land devoted to agricultural uses much more cheaply than urban land, then reap large profits by convincing government to allow the conversion. See *Furey v. City of Sacramento*, 592 F.Supp. 463, 471-72 (E.D. Cal. 1984), *aff'd*, No. 84-2429 (9th Cir. Jan. 21, 1986), and sources cited therein.

¹³ Dresslar, *Agricultural Land Preservation in California: Time for a New View*, 8 Ecology L.Q. 303 (1979).

¹⁴ In 1982, the California Legislature noted that "agriculture is the number one industry in California, which is the leading agricultural state in the nation." Cal. Food & Ag. Code § 802 (West Supp. 1986).

discourage the premature conversion of agricultural land. For example, the "Williamson Act," Cal. Gov. Code §§ 51200-51295 (West, 1983) provides tax relief so that owners of agricultural land may have their property assessed as agricultural land despite any speculative value for conversion to other uses. (Appellant herein does not claim to have applied for such relief.) In addition, in an attempt to stop the domino effect of new residential uses driving out pre-existing agricultural uses, California has adopted a statute precluding nuisance claims by such new neighbors. (See Cal. Civil Code § 3482.5 (West Supp. 1985).)

To hold that appellant can state a claim in this case, where the only government action has been to deny one specific non-agricultural development outside existing city limits while continuing to allow exactly the same use as has historically existed on the property, would destroy California's—and the nation's—ability to retain agricultural land rather than see it destroyed by wave upon wave of suburbia. This Court has in the past allowed virtual destruction of existing property rights for reasons no more compelling. E.g., *Andrus v. Allard*, 444 U.S. 51 (1979); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Powell v. Pennsylvania*, 127 U.S. 678 (1888); *Mugler v. Kansas*, 123 U.S. 623 (1887).

Surely attempts by local and state government to prevent urban sprawl and to preserve our rapidly disappearing agricultural land are entitled to at least as much deference as the attempts to solve the problems perceived by state or local governments in these prior cases, particularly when the "character" of the regulation is such that it only prohibits, perhaps no more than temporarily, a particular new use.¹⁵

¹⁵ While appellant complains that its land's agricultural usefulness has been harmed by neighboring residential developments, appellant says that its land is ideally suited for development (Brief of Appellant at 5) despite the fact that its development would make it more difficult to farm neighboring land such as the 56-acre intervening parcel. (J.A. 73-74.) Accepting appellant's assertions would effectively mean that one could never draw a line around a city and decide that urban uses would be permitted only inside the city limits; as soon as urban uses met

2. The Economic Impact of The Government's Actions Does Not Support a Taking Claim As Appellant Has Not Lost Anything To Which It Had a Right

Since appellant still has precisely what it bought, i.e., a plot of agricultural land with an uncertain possibility of future development, the economic impact of appellees' actions is not constitutionally cognizable. The failure to receive a discretionary permit from the government cannot be the stuff of which takings are made without thoroughly reordering our economic system, making government the guarantor of speculation. (See *MacLeod v. Santa Clara Co.*, *supra*, 749 F.2d 541, 549; *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d. Cir. 1984).)

Appellant says that its property is worthless as agricultural land because of a lack of topsoil and the presence of nematodes, but buying poor farmland cannot be sufficient to create a constitutional right to a permit for other development. The argument regarding the removal of topsoil is especially pernicious since the topsoil was concededly purchased by the government from the land's previous owner. If the prior owner did not disclose this information to appellant, the latter might have a claim against the seller or broker. It cannot argue that by paying for the topsoil the government *also* gave appellant a constitutional right to develop.¹⁶

agricultural uses, the owners of the agricultural lands would be entitled to convert their land.

¹⁶ Another disturbing stratagem by appellant is the attempt to ignore for purposes of this case the fact that appellant owns 108 adjacent acres which are under cultivation. Surely every farmer is not constitutionally entitled to develop the portions of his or her property which are less profitable. See *Penn Central*, *supra*, 438 U.S. 104, 130. The possibility exists, of course, that after approval of residential development on the 44-acre parcel, appellant will assert that the 108 acres is useless for agricultural properties because of residential encroachment. See Brief of Appellees at 8.

3. There Has Been No Interference With "Reasonable Investment-Backed Expectations"

Appellant's brief devotes very little space to this issue. (Brief For Appellant at 13-14.) This brevity is not accidental, as the complaint itself says nothing of any substance on the point. Remarkably, although again perhaps not accidentally, the complaint does not even mention the price appellant paid for the property.¹⁷ The complaint does allege that the property was zoned and planned for residential use when appellant purchased the property. As explained above, this could hardly lead to a reasonable expectation that residential development would necessarily be allowed years later when an application was made, let alone that any one specific application which appellant made would be approved.¹⁸

II

IF A REGULATORY MEASURE IS FOUND TO CONSTITUTE A "TAKING" OF PROPERTY AS APPLIED TO A PARTICULAR PROPERTY OWNER, THE APPROPRIATE AND SUFFICIENT REMEDY IN MOST CASES IS TO REMAND THE MATTER TO THE GOVERNMENTAL ENTITY FOR APPROPRIATE CORRECTIVE ACTION; "INTERIM DAMAGES" ARE NEITHER MANDATED BY THE CONSTITUTION NOR WARRANTED AS A MATTER OF PUBLIC POLICY.

Even if an unlawful taking is assumed to exist on the record in this case, established precedent and important considerations of public policy dictate that compelled payment for a retroactive

¹⁷ The complaint demands payment of \$1,250,000 for a "taking" of 44 acres, certainly a great deal more than one would expect to pay for land being put to agricultural uses.

¹⁸ As explained in detail in the appellees' brief, appellant has mischaracterized the payments made toward sewer assessments. Brief of Appellees at 12 n.13. Moreover, appellant abandoned below its original claim to a right to a refund of these assessments as permitted under California law and thus surely is not entitled to base any taking claim on them. See J.A. 129.

property interest, i.e., "interim damages," is an inappropriate remedy.

A. The Debate Over The Compensation Issue Has Been Overstated; The Relatively Narrow Question Involved Is Whether "Interim Damages" Are An Available Remedy To Cure A "Regulatory Taking."

Appellant and its amici misperceive and overstate the nature of the remedies issues presently before the Court.¹⁹ In fact, as Justice Stevens observes in his concurring opinion in *Williamson County*, *supra*, 105 S.Ct. at 3125-26, relatively little separates the view articulated by Justice Brennan in *San Diego Gas & Electric*, *supra*, 450 U.S. 621, 636-661 and that set forth in *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, *aff'd* on other grds., 447 U.S. 255 (1980). There is in fact no dispute that land use restrictions found constitutionally excessive under the standard enunciated in *Penn Central*, *supra*, 438 U.S. 104, and its progeny cannot be enforced as a permanent restriction on private property without payment of just compensation. See *Williamson County*, *supra*, 105 S.Ct. at 3125 (Stevens, J., concurring); *Furey v. City of Sacramento*, 24 Cal. 3d 862, 874, 157 Cal.Rptr. 684, 691, *cert. denied*, 444 U.S. 976 (1979). Nor do we understand appellant and its amici to disagree with the rule applied in state and federal courts alike that "there is nothing in the Constitution that prevents the government from electing to abandon the perma-

¹⁹ Appellant states the question as follows:

"When land use regulations are found to effect a taking, does the Fifth Amendment require that the property owner receive just compensation, or is the property owner limited to relief invalidating the regulations as applied to the property?" Appellant's Brief at i.

Its amici further obfuscate the issue by erroneously characterizing the so-called "California rule" applied by the court below. "California . . . has developed a rule that just compensation can never be awarded for the adverse impact of land use regulations, regardless of how devastating the effect may be." Amici Curiae Brief of Hollister Ranch Owners Assn., et al., at 2 (emphasis in the original); see also, Amicus Curiae Brief of California Building Industry Association at 2. This interpretation is simply incorrect. (See *infra*.)

ment-harm-causing regulation." *Williamson County*, 105 S.Ct. at p. 3125 (Stevens, J., concurring); see also, *San Diego Gas & Electric*, *supra*, 450 U.S. at 657 (Brennan, J., dissenting). Thus, if a particular regulation is found to be excessive under the Constitution, the government which enacted it must either compensate the landowner or cease applying the offending regulation. To this point, the law is clear and there can be no reasonable dispute.

What is at issue here (and has been at the heart of the remedies debate since *Agins*) is whether and under what circumstances the government is required to compensate a landowner in damages for the period *before* a land use measure is declared a regulatory "taking" and repealed or corrected by the entity involved. It is to this issue—the availability of "interim damages" as a remedy for regulatory takings—that amici now turn their attention.

B. The Court's Prior Decisions Simply Do Not Support The Assertion That A Monetary Remedy Is Compelled For A Regulatory Action Which Constitutes A "Taking"

All interested parties to the debate over whether interim damages are a proper remedy to cure "regulatory takings" can agree that the question is unsettled and will ultimately require guidance from this Court.²⁰ Yet, as it considers the issue, the Court should reflect that mandating a damages remedy for

²⁰ In *Agins*, *San Diego Gas & Electric*, *Williamson County* and again here, the parties and assorted amici have marshalled a stupefying list of reported cases and law review articles that explore this and related issues in excruciating detail. No useful purpose would be served by repeating that exercise here. Suffice it to say that there is a split of opinion within both federal and state court systems, with a corresponding cacophony of debate in academic circles. Cf. Williams, et al., *The White River Junction Manifesto*, 9 Vt.L.R. 193 (1984) (hereinafter "White River") and Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable In Land Use Controls*, 15 Rutgers L.J. 15 (1983), two articles which are representative and ably set forth the competing positions. To borrow a phrase from the Solicitor General, "(r)espectable arguments can be made on both sides of this issue." Brief of the United States as Amicus Curiae at 12. Indeed, the Solicitor General has himself done so.

"regulatory takings" would constitute a marked departure from its past precedents.

The theory that a land use regulatory measure might result in a constitutionally compelled award of damages is of recent origin.²¹ Several notable property law experts, in a comprehensive historical analysis of the Taking Clause, conclude that the clause was never intended to apply to regulation of land at all but, instead, to physical seizures of property by the sovereign. Bosselman, Callies and Banta, *The Taking Issue* (1973) 104, 319. As a group of legal scholars noted recently: "Nothing in the Constitution provides any basis for a new constitutional rule that now, after 200 years of consistent constitutional jurisprudence during which the recognized remedy for unconstitutional regulation was invalidation, the balance has tilted away from deference to legislative discretion to a judicial theory of strict liability." *White River* at pp. 210-211 n. 57.²²

²¹ See, e.g., Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (1978) 256, 272:

"During the first part of this century, courts had called harsh regulations takings, and, since no compensation had been offered, the courts invalidated them. It hardly occurred to anyone that if the regulation was a taking, then a possible remedy was for the property owner to sue in inverse condemnation. . . . 'Until the 1970s, no reported case recognizing inverse condemnation for mere regulation could have been cited.' "

²² Even those who seemingly concur in the views expressed in the dissent of Justice Brennan in *San Diego Gas & Electric*, *supra*, 450 U.S. at 636-61, acknowledge that the concept of a compelled damages remedy represents a departure from established law. See, e.g., Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 Hastings Const. L.Q. 517, 538 (1981): "The traditional recourse of landowners and land developers whose plans for profitable development of land are blocked by restrictive zoning or other land use regulations is a suit to invalidate the regulations on constitutional grounds"; see also, Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L.R. 711, 715 (1982); Blume and Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Calif. L.R. 569, 623 (1984).

The conclusions of these experts are buttressed by legal precedent. As the Court observed in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166 n. 12 (1958), "Ordinarily, the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation." See also, *Pamel Corp. v. Puerto Rico Highway Authority*, 621 F.2d 33, 35 (1st Cir. 1980).

Appellant mistakenly relies upon past cases in which the federal courts have mandated compensation in the face of actual governmental seizure of private property. But such precedents simply reflect the rule that the United States and individual states may constitutionally enter into physical possession of property without first filing condemnation proceedings, and instead require the owner to him or herself institute proceedings for compensation. *United States v. Dow*, 357 U.S. 17, 21 (1958). A corollary principle is that physical invasions of private property rights may trigger a requirement for compensation. *United States v. Lynah*, 188 U.S. 445 (1903) (flooding of plaintiff's land); *United States v. Causby*, 328 U.S. 256 (1946) (airplane overflights). Where such action occurs, an award of damages is generally proper. The nature of such takings accounts for the Court's historical reluctance to utilize injunctive relief when to do so might frustrate legitimate government functions. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Precisely the opposite considerations obtain in the case of alleged takings resulting solely from application of the government's police powers, i.e., "regulatory takings". Such acts are neither permanent nor irreversible. This Court has previously recognized that the distinction between "physical invasion" and "regulatory" takings is one of kind rather than degree. (See *Loretto*, *supra*, 458 U.S. at 426-427, 432, 435; *United States v. Clarke*, 445 U.S. 253, 257-258 (1980).) This critical difference accounts for the traditional judicial preference for equitable remedies in the case of "regulatory takings," and damages in "physical invasion" cases.²³

²³ Appellant's reliance upon the term "inverse condemnation" belies a related flaw in its reasoning. That theory confuses appellant's cause of action—i.e., a claim that appellees have violated its rights under the

In conclusion, creation of a damages remedy for regulatory takings constitutes a radical departure from established standards of judicial review of police power measures.

C. Remanding A Regulatory Measure Which Constitutes A Taking Of Property Is Generally An Effective And Appropriate Remedy.

These amici submit that the appropriate remedy following a finding of a "regulatory taking" is to remand the case to permit the agency or legislative body to make an informed decision as to whether to repeal the offending measure, acquire the parcel or take other sufficient corrective action. Absent unusual circumstances discussed *infra*, interim damages should not be assessed against government for its good-faith, albeit erroneous, exercise of the police power.

This rule respects longstanding precedent while avoiding the imposition of forced purchase of at least a temporary (i.e., retroactive) property interest on an agency that often lacks the requisite power, funds or desire to acquire property.²⁴ The Court should instead afford respondent a reasonable opportunity to cure the taking. In particular cases, purchase may ultimately be the optimum solution; in others, rescission or modification of the offending measure will be appropriate. A blanket rule imposing interim damages as a compelled remedy, however, would be

Fifth and Fourteenth Amendments by depriving it of substantially all beneficial use of its property without compensation—with the remedy they seek—i.e., money damages. The two are not the same: the cause of action may exist without regard to what relief is requested or granted *Davis v. Passman*, 442 U.S. 228, 239-240 at n.18 (1979). California law has been in accord for nearly a century. *San Diego Land & Town Co. v. Neale*, 78 Cal. 80, 82, 20 P. 380, 381 (1889) (the right to pursue relief for an unconstitutional "taking" does not carry with it an unfettered right to a particular remedy).

²⁴ Amicus California Coastal Commission lacks the power of condemnation. Similarly, the comprehensive California statutory framework which delegates to local government authority for land use planning and zoning matters expressly disclaims any intent to authorize appropriation of private property as an outgrowth of those activities. (Gov. Code § 65912 (West 1985).)

inflexible and ultimately counter-productive. (See part II (D), *infra*.) The central point is that the choice of the appropriate remedy should be left in the first instance to the governmental agency, to be made on the basis of informed decision-making.

How this rule can and should be applied is illustrated by the California Supreme Court's recent decision in *Furey v. City of Sacramento*, *supra*, 24 Cal.3d 862, 157 Cal.Rptr. 684, a case which bears directly on the present action and which appellant inexplicably fails to address. In *Furey*, the court held that allegations that a city encouraged installation of public improvements with private funds, if proven, could constitute a taking where subsequent municipal zoning rendered those improvements worthless. 24 Cal.3d at 874, 157 Cal.Rptr. at 691. The court, however, rejected an award of damages premised on a theory of inverse condemnation. It instead found it appropriate to remand the proceedings to the local governmental entities to afford them "a reasonable opportunity to make use of the reassessment procedures . . . or to take other appropriate action directed toward ameliorating in equitable fashion the gross inequities which here appear." 24 Cal.3d at 878, 157 Cal.Rptr. at 693; see also, *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475, 480-489 (1979) (requiring remand for administrative corrective action following judicial finding of a taking); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980).²⁵

Appellant and its supporters argue several points in opposition to the established remedy of invalidation in lieu of damages. First, they contend that the remedy is simply not invoked (at least in California) in response to legitimate challenges to land use measures. An objective review of the cases, however, reveals this argument to be utterly without merit.²⁶

²⁵ Various existing or proposed statutes further refine the procedures governing this process. (See, e.g., the Delaware Wetlands Law (7 Delaware Code, ch. 66); Mass. Gen. Laws C. 131, 40A and C.130, 105; ALI Model Land Development Code, 9-112(3).)

²⁶ Appellant and its amici excoriate the California judiciary for allegedly failing to grant any remedy in appropriate land use cases. This argument is patently erroneous and elevates empty rhetoric over docu-

Similarly, California statutes facilitate in a number of important ways the prompt and fair resolution of judicial challenges to

mented fact. California courts have regularly acted to protect landowners and developers from overreaching by public agencies. For example, in recent years the California courts have invalidated overly restrictive land use measures *Hoshour v. County of Contra Costa*, 203 Cal.App.2d 602, 21 Cal. Rptr. 714 (1962); *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, cert. denied, 444 U.S. 976 (1979); *Billings v. California Coastal Commission*, 103 Cal.App.3d 729, 163 Cal.Rptr. 288 (1980); *City of Chula Vista v. Pagard*, 115 Cal.App.3d 785, 171 Cal.Rptr. 738 (1981); *Arnel Development Company v. City of Costa Mesa*, 126 Cal.App.3d 330, 178 Cal.Rptr. 723 (1981); stricken onerous conditions placed upon permits issued by public agencies (*Georgia-Pacific Corp. v. California Coastal Comm.*, 132 Cal.App.3d 678, 183 Cal.Rptr. 395 (1982); *Bank of America v. State Water Resources Control Board*, 42 Cal.App.3d 198, 116 Cal.Rptr. 770 (1974); *Liberty v. California Coastal Commission*, 113 Cal.App.3d 492, 170 Cal.Rptr. 247 (1980); *Scrutton v. County of Sacramento*, 275 Cal.App.2d 412, 79 Cal.Rptr. 872 (1969)); upheld the issuance of conditional use permits and other land use permits (*Jacobson v. County of Los Angeles*, 69 Cal.App.3d 374, 137 Cal.Rptr. 909 (1977); *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission*, 57 Cal.App.3d 76, 129 Cal.Rptr. 57 (1976); upheld the issuance of variances (*Zakessian v. City of Sausalito*, 28 Cal.App.3d 794, 105 Cal.Rptr. 105 (1972); *Allen v. Humboldt County Board of Supervisors*, 241 Cal.App.2d 158, 50 Cal.Rptr. 444 (1966); upheld local governments' approval of subdivision maps (*Youngblood v. Board of Supervisors*, 22 Cal.3d 644, 150 Cal.Rptr. 242 (1978); *McMillan v. American General Finance Corp.*, 60 Cal.App.3d 175, 131 Cal.Rptr. 462 (1976); and upheld landowner claims of exemptions from permit controls of the California Coastal Commission. *Pardee Construction Co. v. California Coastal Commission*, 95 Cal.App.3d 471, 157 Cal.Rptr. 184 (1979); *Sierra Club v. California Coastal Zone Conservation Commission*, 58 Cal.App.3d 149, 129 Cal.Rptr. 743 (1976); *San Diego Coast Regional Commission v. See the Sea, Ltd.*, 9 Cal.3d 888, 109 Cal.Rptr. 377, 513 P.2d 129 (1973).

Indeed, in several important areas California law has been more protective of landowners' rights than is federal law. Compare, e.g., *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 164 Cal.Rptr. 539 (1980) (municipal ordinance limiting number of unrelated persons living together invalidated as violative of right of privacy) with *Village of Belle*

invalidate land use regulations. See, e.g., Cal. Code Civ. Proc. § 1062.3, Cal. Gov. Code § 66499.37 (West 1985) (granting preference on the trial calendar to such cases); Cal. Code Civ. Proc., § 1036 (West 1985) (awarding attorney's fees and related expenses to successful plaintiffs in "inverse condemnation" actions); Cal. Evid. Code § 669.5 (West 1985) (shifting to the governmental agency the burden of proof in justifying local growth control measures against judicial attack); and Cal. Gov. Code § 65589.6 (West 1985) (similar shift in burden of proof regarding challenge to local government decisions rejecting housing projects or reducing their density).²⁷

Appellant suggests that even if state courts are prepared to invalidate regulatory measures in appropriate cases, the remedy is ineffective because local planning entities would prove intransigent and frustrate meaningful relief. This argument is defective on several levels.

First, it ignores the unquestionable power of a trial court to retain continuing jurisdiction over a case following its finding that a particular measure is constitutionally excessive. The judge, having initially found a "taking," exercises his or her inherent and traditional supervisory power to oversee the administrative decision-making process on remand. This includes the ultimate power

Terre v. Boraas, 416 U.S. 1 (1974) (contra); *Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore*, 18 Cal.3d 582, 135 Cal.Rptr. 641 (1976) (requiring local growth control measures to accommodate regional housing needs, and granting developers standing to enforce that obligation) with *Construction Industry Assn. of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir.), cert. den., 424 U.S. 934 (1976) (contra).

This list is illustrative of the degree to which state courts do provide effective relief in landowner challenges to planning and zoning decisions.

²⁷ Again, California's sister states afford similar procedural benefits to landowners or developers seeking judicial invalidation of planning or zoning measures. See, e.g., art. 78, Civil Practice Law and Rules of the State of New York (establishing summary procedures in administrative review cases.).

to mandate specific administrative actions in appropriate cases.²⁸ The trial court's retention of such an oversight role refutes the contention that public agencies will simply change an invalidated regulatory measure so as to frustrate both the judicial decree of invalidation and the landowner's private property rights.

More fundamentally, this argument denigrates the honesty and integrity of local decision-makers in general. Public officials, after all, are sworn to uphold constitutional rights to the best of their ability. They are not likely knowingly and voluntarily to violate that oath. Nor will they lightly risk contempt of court sanctions for attempting to subvert judicial decrees.

Similarly overlooked is the fact that litigation per se—even without the spectre of an interim damages remedy—provides a powerful disincentive against improper governmental conduct. The prospect of expensive and time-consuming litigation, together with the assessment of substantial costs and attorney's fees in cases governments lose,²⁹ is likely to deter precisely the type of conduct that proponents of a damages remedy find so repugnant.

There are additional reasons why interim damages should be rejected in favor of equitable relief. This Court has consistently held that a property owner may suffer temporary economic harm without finding redress under the Fifth Amendment. *Danforth v. United States*, 308 U.S. 271 (1939). As Justice Powell observed for a unanimous Court in *Agins v. City of Tiburon*, *supra*, 447 U.S. 255, 263n.9:

"Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent

²⁸ See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390, 490-491 (1983); *Furey v. City of Sacramento*, *supra*, 24 Cal.3d 862, 157 Cal.Rptr. 684.

²⁹ E.g., California Code of Civ. Procedure §§ 1032, 1036 (West 1985).

extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"³⁰

Damages are therefore unnecessary and inappropriate in cases where temporary regulatory "takings" are the product of good faith governmental attempts to administer land use programs.

³⁰ See also 2 J.Sackman & P. Rohan, *Nichols' Law of Eminent Domain* 6.13[3] (3d ed. 1979); *HFH, Ltd. v. Superior Court*, *supra*, 15 Cal.3d 508, 518-520, 125 Cal.Rptr. 365, 372-74. Referring to the metaphor adopted by the Court in *Andrus v. Allard*, *supra*, 444 U.S. 51, 65-66, government's temporary interference with land use at most destroys one part of one strand of a landowner's property rights. "The mere inconvenience of a temporary interference in the use of land, while a court tests the validity of a police power regulation, . . . can hardly be said to be a 'taking' when viewed in the aggregate." *White River* at 217; cf. *Penn Central*, *supra*, 438 U.S. at 130-131.

Moreover, such short-term losses are far less substantial than those traditionally found non-compensable under the venerable rule that a mere diminution in the value of property is not a constitutional taking. (See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% reduction in value) and *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (75% reduction in value).)

Conversely, the development of land is normally irreversible. Thus there exists a strong countervailing public interest in maintaining the status quo pending a court's resolution of a judicial challenge over a measure's constitutionality. The temporary application of a regulatory measure in this context therefore has essentially the same effect as interlocutory relief. It "is fairly characterized as an inevitable cost of doing business in a highly regulated society." (*Willidmson County*, *supra*, 105 S.Ct. at 3126 (Stevens, J. concurring).) Depending on changes in property values, the net effect of delay may be to increase the value of the property. One would assume landowners in such circumstances would not consider that increase to be properly shared with the planning entity.

This principle is analogous to the numerous federal and state court decisions which have upheld the power of agencies to impose good faith, fixed-term moratoria on land use development. See, e.g., *Donohoe Construction Co., Inc. v. Montgomery Co.*, 567 F.2d 603, 608 (4th Cir. 1977); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm.*, 400 F.Supp. 1369, 1382-1383 (D. Md. 1975); *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, cert. denied 273 U.S. 781 (1927).

Inadvertent regulatory excess under such circumstances can be properly corrected by remanding the matter to the administrative/legislative body for corrective action.

Left to be considered is the rare case where malicious or wanton conduct is at work. E.g., *San Diego Gas & Electric Co. v. City of San Diego*, *supra*, 450 U.S. at 644, n. 22 (Brennan, J., dissenting). Such conduct cannot be condoned and might well warrant an award of damages. Yet this Court has had little difficulty fashioning precise rules to correct intentional constitutional torts in a variety of contexts. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-270 (1981); *Harlow v. Fitzgerald*, *supra*, 457 U.S. 800, 817-819 *cf. Daniels v. Williams*, — U.S. — (Jan. 21, 1986). There is no reason to believe that it is any less able to articulate such effective and precise sanctions in the case of zoning officials who knowingly abuse their important offices.

Similarly, cases involving unreasonable delay or improper precondemnation conduct by an agency also warrant a remedy in damages—as exists under California law. *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal.Rptr. 1 (1972); *cf. Drakes Bay Land Co. v. United States*, 459 F.2d 504 (Cl. Ct. 1972).

The essential flaw in the interim damages remedy urged by appellant is that it “would punish the well-intentional local legislature as well as the odious one.” *White River* at 243. This Court has previously alluded to the need to focus upon bad faith conduct in passing upon land use measures.³¹

In the vast majority of cases, however, it is indisputable that state, regional and local planning officials act in good faith. Inadvertent regulatory excess under such circumstances can be

³¹ See, e.g., *Agins v. City of Tiburon*, *supra*, 447 U.S. at 260 (a taking may arise if an “ordinance does not substantially advance legitimate state interests”), 263 n.9 (“The State Supreme Court correctly rejected the contention that the municipality’s good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants’ enjoyment of their property as to constitute a taking.” (Emphasis added.)

corrected fully by remanding the matter to the administrative/legislative body for corrective action.³²

D. Compelled Payment of Interim Damages To Remedy A “Regulatory Taking” Contravenes Several Important Public Policies

Numerous important considerations of public policy underlie the longstanding rule that judicially imposed “interim damages” are inappropriate in a case involving a “regulatory taking.” Several of the most important are summarized below.³³

³² Speaking to the damages issue, Justice Brennan has inquired: “If a policeman must know the Constitution, then why not a planner?” *San Diego Gas & Electric*, *supra*, 450 U.S. at 661 n.26. The answer, of course, must be in the affirmative. The more specific and difficult issue in this case, however, is the appropriate remedy to cure a “taking.” Returning to Justice Brennan’s policeman analogy, the remedy devised by the Court and commonly applied to address illegal searches and seizures by law enforcement officials is to invoke the exclusionary rule, i.e., to “invalidate” the evidence. (*Mapp v. Ohio*, 367 U.S. 643 (1961)). It is only in the relatively rare case of wanton or malicious police conduct that damages have been deemed an appropriate remedy assessed against the officials involved. *Monroe v. Pape*, 365 U.S. 167 (1961), overruled on other grounds, *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Precisely the same principle should apply in the land use planning field. Willful, bad faith acts by regulators are properly compensable through damages. (See text.) Yet to go further and impose an interim damages remedy on entities and officials for their good faith efforts to administer planning functions would be to transmute the police power into strict liability in tort. “Of course, it is not a tort for government to govern . . .” *Dalehite v. United States*, 346 U.S. 15, 57 (1952) (Jackson, J., dissenting).

³³ Appellant and its amici suggest that it is somehow improper for the Court to weigh “policy considerations” in determining the appropriate remedy in this case. But policy is the touchstone of constitutional law. This Court has never shrunk from weighing policy matters in fashioning remedies to cure a broad spectrum of constitutional injustices. *Mapp v. Ohio*, *supra*, 367 U.S. 643; *Bivens*, *supra*; *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1972); *cf. Village of Belle Terre v.*

1. Required Payment of Compensation In The Form of Interim Damages to Correct a Regulatory "Taking" Is Inappropriate. Such Relief Would Effectively Transfer the Power of Eminent Domain From State and Local Legislators to the Judiciary, And Is Therefore Inconsistent With The Separation of Powers Doctrine

Appellant's theory of "temporary takings" would, if accepted, transfer a significant portion of the power of the purse from local and state legislatures to the judiciary, with concomitant damage to legislative independence. The judiciary must make the often difficult determination of whether a particular regulatory action is sufficiently oppressive that it violates a landowner's constitutional rights. That decision can involve close questions and subtle distinctions, but constitutes the acceptable price always associated with judicial line-drawing in a complex policy area. However, under appellant's argument, the price of stepping over the line, however slightly and however innocently, would effectively force purchase of a retroactive property interest, unbudgeted and unplanned, virtually impossible to anticipate.

The power to regulate and the power of eminent domain are two distinct powers of government. See, e.g., *Fred F. French Invest. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 384-385 N.Y. Supp.2d 5, 8-9, app. diss. 429 U.S. 990 (1976). The fact that the former may be limited by the same constitutional clause which limits the latter does not mean that the latter has been exercised when that limit is reached. Where the legislature has not chosen to exercise its eminent domain power, the courts should not compel its use as a damage remedy. This result simply recognizes the proper constitutional role of the legislative branch of government in determining when that legislative power should be exercised.³⁴

Boruas, 416 U.S. 1, 9 (1974). To do otherwise before working a radical change in the relationship between the three branches of government is not merely permissible. It is imperative.

³⁴ For example, in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the question was whether certain critical provisions of the Act there involved were "takings." The Court stated:

Sensitivity to the separation of powers concern is abundantly reflected in recent takings jurisprudence. See, e.g., *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Cl. Cl. 1978); *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901, 904 (D.Nev.), aff'd. on other grds., 661 F.2d 940 (9th Cir. 1981); *Agins v. City of Tiburon*, supra, 24 Cal.3d 266, 276, 157 Cal.Rptr. 372, 377 (1979); cf. *National Wildlife Federation v. United States*, 626 F.2d 917 (D.C. Cir. 1980).

In summary, it is indisputably the courts' obligation to determine whether a regulatory measure effects a taking in a particular case. But the weighing of costs and benefits leading to the decision whether compensation should be paid is properly left to the legislative branch rather than the courts.

"There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." (*Id.* at 134.)

The entire premise of the opinion was that if the Tucker Act would be available to provide a monetary remedy for any deficiency in payment to the railroads, the availability of that Act would remedy any constitutional infirmity which might otherwise exist because of no provision for compensation in the Rail Act. This Court concluded that Congress had not intended to withdraw the Tucker Act grant of jurisdiction to the Court of Claims in suits arising under the Rail Act. It seems apparent that had this Court concluded that Congress had not intended to provide compensation, the offending provisions of the Rail Act would have been stricken.

In *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Court held that repeal of certain bond provisions violated the Contract Clause and thus declared that action unconstitutional and void. *Id.* at 32. The opinion noted that:

"The state remains free to exercise their powers of eminent domain to abrogate such contractual rights, upon the payment of just compensation." *Id.* at 29, n.27.

Thus, the Court invalidated the offending measure and left to the legislative body the choice of whether to extinguish those rights by payment of just compensation.

2. Adoption of a Compelled Interim Damages Rule In Land Use Cases Would Result In Major Additional Fiscal Problems For State and Local Governments

Closely related to the separation of powers concerns discussed above is the fact that the rule urged by appellant could undermine the fiscal well-being of state and local governments.

Judicially-compelled damages in this context could have major adverse fiscal consequences. With the advent of severe tax reduction measures across the nation (such as California's Proposition 13 (Cal.Const. Art. XIII A), adopted by voter initiative in 1978), state and local governments are being asked to meet increasing demands with a stable or even declining revenue base.³⁵

At a time when the federal government looks to state and local jurisdictions to provide an increasing proportion of necessary public services (e.g., Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), P.L. 99-177), it would be singularly inappropriate to add to that financial burden through the creation of a novel damages remedy for "temporary takings."

Various proponents of an interim damages remedy suggest that its creation would in fact impose an inconsequential degree of financial hardship upon affected jurisdictions. See, e.g., Brief of

³⁵ As one scholarly analysis observes, "The most important current fact about local government is that its revenue base is wholly inadequate. The traditional system of financing major public services through local real property taxation, and in some states local sales and excise taxes has visibly been breaking down all around us. The system simply does not produce enough revenue to provide for what are even now regarded as the normal functions of local government. In this situation, local officials are inevitably and necessarily preoccupied with the problem of finding more sources of revenue, and trying to keep down demands for additional services." *White River* at 207.

To observe a particular manifestation of this general problem, the Court need look no further than the parties in the existing case. See "Yolo [County] Halts Hiring, Faces Budget Cuts," *Sacramento Bee*, Jan. 8, 1986, at B1 col. 6 (detailing pending personnel layoffs and budget cuts attributable to current revenue shortfall).

Amici Curiae Pacific Legal Foundation, et al., at 19-20.³⁶ The evidence to date proves this theory incorrect.³⁷ In fact, monetary judgments in such cases could well destroy state and local government's ability to provide necessary public services.

Appellant maintains that such financial considerations should ultimately be irrelevant to the determination of whether interim damages are an appropriate remedy in this case. Yet this Court has regularly taken cognizance of fiscal considerations in fashioning appropriate remedies to cure constitutional violations. E.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (punitive damages generally not allowed against municipalities in § 1983 actions); see also, *Harlow v. Fitzgerald*, 457 U.S. 800, 816-819. (1982).

³⁶ Cf. Brief of Amicus Curiae California Building Industry Assn. at 23: "Government's potential liability under the Just Compensation Clause may not be clearly measurable. . . ."

³⁷ See, e.g., *Herrington v. County of Sonoma*, No. C 80-2227-SAW (N.D. Cal.), in which plaintiffs in a federal inverse condemnation action were recently awarded \$2.5 million. (The county is currently seeking to have the verdict modified in the district court.)

The prospect of fiscal disaster is by no means limited to local government. The bi-state Tahoe Regional Planning Agency has recently been sued by landowners in the Lake Tahoe Basin as a result of its adoption of a revised regional plan. Plaintiffs—who assert no bad faith or malicious conduct on the part of T.R.P.A.—seek damages that aggregate over \$26 million. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, Case No. CIV-S-84-0816-EJG (E.D.Cal.); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, Case No. CV-R-84-257-ECR (D.Nev.). These claims, if successful, would no doubt bankrupt the agency, which lacks insurance and depends on voluntary appropriations by the States of Nevada and California for its major source of funding.

The federal government is also vulnerable to such inverse condemnation claims. See, e.g., *Florida Rock Industries, Inc. v. United States*, 8 Ct.Cl. 160, 22 ERC 1943 (1985), in which the U.S. was held liable for damages in excess of \$1 million as a result of its denial of a dredge and fill permit under section 404 of the Clean Water Act. The case is currently on appeal to the Federal Circuit (No. 85-2588).

Finally, courts have recognized the adverse federalism-related consequences of imposing upon the federal judiciary the *de facto* task of allocating state and local funds. "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy." *Pamel Corp. v. Puerto Rico Highway Authority*, 621 F.2d 33, 36 (1st Cir. 1980); *Agins v. City of Tiburon*, *supra*, 24 Cal.3d 266, 276, 157 Cal.Rptr. 372, 377.

3. The Required Payment of Interim Damages in Land Use Cases Will Have a Chilling Effect On The Exercise of Necessary Planning Functions, Particularly Given the Nebulous Nature of Taking Jurisprudence

The award of damages against land use planning entities predicated on a "temporary taking" theory is likely to have a major chilling effect upon this essential governmental function. Given the limited budgets of most such regulatory bodies, only the bravest official will venture more than the mildest, and most ineffectual, form of land use controls.³⁸

This Court has repeatedly expressed the same concern. E.g., *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,

³⁸ As one commentator observed in reviewing the *Agins* case:

"The upholding of *Agins*' position would have had only the effect of making local governments or public entities very cautious in the use of police power. They would retreat to the safety of proven regulations sanctioned by *stare decisis*. If this had been the meaning of *Euclid* and *Nectow*, very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone, and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked." Wright, *Exclusionary Land Use Controls and the Taking Issue*, 8 Hastings Const. L.Q. 545, 583 (1981); see also, *White River* at 240; *Hall, Eldridge v. City of Palo Alto: Aberration of New Directions in Land Use Law?*, 28 Hastings L.J. 1569, 1597 (1977); Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, Urb. L. Ann. 1-2 (1968).

supra, 440 U.S. 391, 405; *Harlow v. Fitzgerald*, *supra*, 457 U.S. 800, 814, 817 n.29.³⁹

If governmental entities may exercise their regulatory powers only at the risk that they may have erred and therefore inadvertently "purchased" temporary interests in regulated parcels, appropriate and necessary regulation of land by both traditional and modern methods will be substantially inhibited, with a predictable adverse effect on the nation's environment. *Charles v. Diamond*, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594, 604-605 (1977); *CEED v. California Coastal Zone Conservation Commission*, 43 Cal.App.3d 306, 327, 118 Cal.Rptr. 315, 330 (1974); *Allen v. City and County of Honolulu*, 471 P.2d 328, 331 (Ha. 1977).

³⁹ Appellant dismisses as mere speculation the deleterious effect an interim damages sanction would have on the planning process. Yet illustrations abound. One study noted in a recent law review article involved zoning regulations modeled on those reviewed by this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding municipal closure of sand and gravel mine). When nearly 300 county planning associations were asked if they would attempt to close the quarry based on the regulations if a successful suit by a landowner would result in a damages award as well as invalidation of the regulation, only eight percent of the members polled said they would do so. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 Cath. L.R. 465, 478 (1982).

Opportunities for harassment of local officials through an interim damages remedy are considerable. One well-publicized recent case in California involved an attorney's efforts to operate his law office in an area zoned for residential use over the objection of neighboring homeowners. In response to the county's commencement of a zoning enforcement action, the attorney sued, *inter alia*, to invalidate the measure and seek damages under 42 U.S.C. section 1983 from the county and an individual county supervisor whose principal involvement apparently was to have met with some of the affected neighbors/constituents. The jury returned a verdict of \$650,962 each in damages against the county and the individual supervisor. The verdict was ultimately reversed on appeal following expensive and protracted legal proceedings. *County of Butte v. Bach*, 172 Cal.App.3d 848, 218 Cal.Rptr. 613 (1985).

This Court has consistently emphasized that a damages remedy should not be available where it would have such a chilling effect:

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subject to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); see also *Harlow v. Fitzgerald*, *supra*, 457 U.S. 800, 814.

Further, as the Solicitor General has correctly noted (see Brief for the United States as Amicus Curiae in *San Diego Gas & Electric* at 30 n.34), imposition of a mandatory damages remedy in regulatory taking cases could well discourage state and local governments from participating in a wide variety of federal programs that depend for their effectiveness on state and local implementation. See, e.g., Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et seq.; cf. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., 1344(g) (delegation to states of § 404 dredge-and-fill program).

The disincentive represented by a damages remedy is reinforced by the nebulous nature of underlying taking jurisprudence. This Court has repeatedly professed itself unable to fashion any general standards to determine when regulation of land exceeds the limits of the Fifth Amendment. Rather, it has indicated that the inquiry is necessarily an ad hoc application of general standards to particularized facts. *Penn Central*, *supra*, 438 U.S. at 124.

"The plain fact is that the police power regulation of land use is not reducible to a simple equation. The ever-changing face of our land condemns us to an ever-shifting standard of what will be determined to be constitutionally 'overzealous' . . . There has never been a readily ascertainable way to tell when a regulation is or will be a 'taking' and none is in prospect. If 'takings' are to be compensable events, then local

government must either err on the side of excessive timidity in land use regulation, or else be willing to risk an occasional 'temporary taking' judgment as the price of effective land use regulation." *White River* at 225.⁴⁰

⁴⁰ There is a further reason why blanket invocation of an interim damages remedy would constitute a radical departure from existing law and policy. Temporary delay in securing economic benefits generally is "a by-product of governmental decisionmaking . . . an inevitable cost of doing business in a highly regulated society." *Williamson County*, *supra*, 105 U.S. at 3126 (Stevens, J., concurring); *Andrus v. Allard*, *supra*, 444 U.S. at 67. In a salient passage from *Suess Builders Co. v. Beaverton*, 294 Or. 254, 656 P.2d 306, 309 (1982), Justice Hans Linde of the Oregon Supreme Court pointed out that an exercise of the police power, including a regulation affecting land, does not give rise to a right of compensation. Rather, "Business invests with knowledge of such governmental power to make laws for its conduct . . ." Justice Linde noted:

"A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant. A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety or access for handicapped persons may make it uneconomic to maintain a hotel or residential building, with consequent financial loss. Business invests with knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for 'just compensation.' Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land." (Footnotes and citations omitted.)

To impose an interim damages remedy upon land use planning agencies for good faith regulatory actions would saddle them with a major fiscal burden neither warranted nor afforded the private sector in other fields of economic regulation. There exists no law or policy-based reason to carve out a special exception for planning and zoning matters.

4. Creation Of A Damages Remedy for Temporary Takings Will Generate Additional Complex and Time-Consuming Litigation In Federal And State Courts

An interim damages remedy, if embraced by the Court, will precipitate substantial additional litigation in federal and state courts alike. This would be particularly burdensome on the federal court system, which has repeatedly professed itself unwilling to plumb the intricacies of local land use regulatory measures. See, e.g., *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 378-80 (9th Cir. 1983).

Perhaps more significantly, adoption of a temporary taking theory will by necessity inject complex economic questions into land use litigation that are absent under current law. One such issue is the measure by which interim damages are to be assessed: some increment of fair market value? the loss of rental income? a computation based on interest rates? No firm guidelines presently exist on this issue.⁴¹ Equally troublesome is the question of when a "taking" is deemed to have commenced. See, e.g., Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. Law. 447, 473 (1983) (arguing that a "taking" runs not from the time of an ordinance's enactment, but from its application to a particular factual setting); accord: *Williamson County, supra*, 105 S.Ct. at 3119; see also *Hernandez v. City of Lafayette, supra*, 643 F.2d 1188, 1200. Appellant, on the other hand, assumes without benefit of authority that a taking is measured from the date the ordinance was originally enacted.

Further complicating the analysis is the common situation, typified by the present case, where delay in pursuing the judicial challenge is wholly or partially attributable to the landowner him or herself. *Ibid.*; J.A. 18-20. Finally and most importantly, proving the amount of interim damages, particularly with respect to raw land, would be an exercise in wholesale speculation. E.g., *Andrus*

⁴¹ *White River* at 223-25; *San Diego Gas & Electric* at 659-60 (Brennan, J., dissenting). Even devotees of an interim damages remedy acknowledge severe problems in fashioning relief in such cases. Blume and Rubenfield, *Compensation for Takings: An Economic Analysis*, 72 Calif. L.R. 369, 624 (1984).

v. Allard, supra, 444 U.S. at 66 ("Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform"); *Mosca v. United States, supra*, 417 F.2d 1382, 1386; *City of Austin v. Teague*, 570 S.W.2d 389, 395 (Tex. 1978) ("Anticipated rentals from land that is presently undeveloped is just as speculative and uncertain as measuring anticipated profits from a presently unestablished business.").

This complex, time-consuming task is eliminated if the traditional remedy of invalidation is retained in the case of regulatory takings.⁴²

E. Recent Decisions of This Court Involving Constitutional Torts by Government Officials and 42 U.S.C. § 1983 Suggest Federal Deference To Available State Remedies; Land Use Regulation Is Perhaps the Classic Example of "Special Circumstances Counselling Hesitation" Where Money Damages Would Be Inappropriate

Appellant asserts that it is constitutionally entitled to a damages remedy because invalidation of zoning and planning measures found to constitute a taking would be an inadequate remedy. Yet principles of federalism afford state courts broad discretion in fashioning remedies for violations of federal rights, so long as the state courts provide an adequate remedy. (See generally Hill, *Constitutional Remedies*, 60 Colum. L. Rev. 1109, 1118 (1969).) This Court has interfered with the states' choice of remedy for violations of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation. (*Aboud v. Detroit Board of Education*, 431 U.S. 209, 237-242 and n.45 (1977); see also, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).) Indeed, this Court has specifically expressed a willingness to defer to traditional remedies afforded under state law in the face of state or local actions resulting in a

⁴² The problem of determining interim damages usually would not arise where the affected agency chooses to initiate condemnation proceedings, acquire a property interest and pay just compensation (generally measured by fair market value) to the landowner for the permanent taking of the parcel.

taking. (*Parratt v. Taylor*, 451 U.S. 527, 537-539 (1981); *Hudson v. Palmer*, 468 U.S. —, 104 S.Ct. 3194 (1984).)

Contrary to appellant's assertion, past cases involving damage actions arising either directly under the Constitution or under 42 U.S.C. 1983 do not assist appellant. E.g., *Owen v. City of Independence*, 445 U.S. 622 (1980); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. 388. In these decisions, as well as in others involving a constitutional claim to a monetary damage remedy, the Court has consistently emphasized that there may be "special circumstances counselling hesitation" where money damages would not be appropriate. *Bivens*, 443 U.S. at 396-97; *Owen*, 445 U.S. at 651; see also, *Carlson v. Green*, 446 U.S. 14, 18 (1980); *Davis v. Passman*, 442 U.S. 228, 245 (1979).

Amici respectfully submit that the factors discussed in part II(D) of this brief constitute such "special circumstances counselling hesitation," and that a compelled damage remedy is singularly inappropriate in the case of an unconstitutional land use regulation. It is not "damages or nothing" in this case (*cf. Bivens*, 403 U.S. at 410 (Harlan, J., concurring)); another remedy, equally effective, exists.

Appellant's reliance on section 1983 is particularly misplaced in light of recent Supreme Court decisions finding governmental immunity for state and local officials unless plaintiffs demonstrate that the exact requirements of the constitutional right at issue had been spelled out by a federal court prior to the alleged violation. *Davis v. Scherer*, 468 U.S. —, 104 S.Ct. 3012 (1984); *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818; *Blackmun, Section 1983 and Federal Protection of Individual Rights—Will The Statute Remain Alive or Fade Away?*, 60 N.Y.U.L.R. 1, 24 (1985). Inasmuch as there is perhaps no branch of constitutional law in as great a state of flux as taking jurisprudence (C. Haar, *Land Use Planning* (3rd ed. 1966) 766), it is especially inappropriate to rely on section 1983 to support creation of an interim damages remedy in this case.⁴³

⁴³ The Solicitor General's thinly disguised efforts to distinguish state and local governments' purported liability for "temporary takings" (i.e.,

CONCLUSION

Either the appeal should be dismissed for want of a substantial federal question or the judgment of the California Court of Appeal should be affirmed.

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Respectfully submitted,

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under section 1983) from that of the United States (directly under the Constitution or through the Tucker Act (28 U.S.C. § 1491) is unavailing. Brief for the United States as Amicus Curiae at 24-26. The theory is fundamentally inconsistent with past precedents treating actions brought under section 1983 coextensive or *more narrowly* than those brought directly under the Constitution. See *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818 n.30; *Gordon v. City of Warren*, 579 F.2d 386, 390-391 (6th Cir. 1978); *cf. Weiss v. Lehman*, 642 F.2d 265, 267-268 (9th Cir. 1981).) The Solicitor General's argument further ignores those decisions finding the federal government liable in inverse condemnation directly under the Constitution and the Tucker Act. E.g., *Kaiser Aetna v. United States*, 444 U.S. 164; *Florida Rock Industries, Inc. v. United States*, *supra*, 8 Ct.Cl. 160, 22 ERC 1943 (1985); see also, *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*, 452 U.S. 264. The Solicitor General has previously acknowledged that holding state and local governments liable under the theory posited by appellant would apply equally to the United States. See Brief for the United States as Amicus Curiae in *Williamson County* at 17 n.12.)